In The Matter Of:

Philip Morris v. ABC

Clifford Douglas - Vol. 2
December 21, 1994

Jane Rose - Real Time Reporting
308 East Fifty-First Street
New York, NY 10022
(800) 825-3341

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IN THE STATE OF VIRGINIA
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING
PHILIP MORRIS COMPANIES INC.
and
PHILIP MORRIS INCORPORATED,
Plaintiffs,
vs.
AMERICAN BROADCASTING COMPANIES, INC.,
JOHN MARTIN,
and
WALT BOGDANICH,
Defendants.
AT LAW NO. 760CL94X00616-00
DEPOSITION OF: Clifford Douglas
DATE: December 21, 1994
Volume 2
Pages 306 through 613
PLACE: Bethesda, Maryland
BEFORE: Jane C. Rose, CSR, CRR
308 East 51st Street
New York, New York 10022
1-212-486-9028

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ATTORNEYS FOR PHILIP MORRIS COMPANIES:
Herbert M. Wachtell, Esquire
David M. Murphy, Esquire
Eugene P. Stein, Esquire
WACHTELL LIPTON ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
212-403-1000
FAX: 212-403-2000
Michael P. McQuillen, Esquire
Chip Nunley, Esquire
HUNTON & WILLIAMS
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
202-955-1500
FAX: 202-778-2201

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ATTORNEYS FOR AMERICAN BROADCASTING COMPANIES:
Roger M. Witten, Esquire
WILMER CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
202-663-6000
FAX: 202-663-6363
ATTORNEYS FOR CLIFFORD DOUGLAS:
Allison Zeive, Esquire
David Vladeck, Esquire
PUBLIC CITIZEN LITIGATION GROUP
2000 P Street, N.W.
Washington, D.C. 20036
202-833-3000
FAX: 202-452-8658

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[1] December 21, 1994 - 9:08 a.m.

[2] Bethesda, Maryland

[4] **CLIFFORD DOUGLAS,** [DELETED] [DELETED] having been previously sworn, was examined and testified as follows:

[9] **VIDEO OPERATOR:** Today is December 21st, 1994. The time is approximately 9:08 a.m.

[12] This is the beginning of tape number 4, a continuation from December 20, 1994.

EXAMINATION

[18] **BY MR. WACHTELL:**

[19] **Q:** Mr. Douglas, you understand that you are still under oath?

[21] **A:** Yes, I do.

[22] **Q:** At the close of yesterday's deposition, you stated that there was a time where you were not sure that the ABC show would air.

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[1] Would you tell me about that?

[2] **MR. WACHTELL:** One second, please.

[4] Mr. Witten, we requested that there be produced for this morning's deposition an unredacted version of whatever notes or documents exist in the possession of defendants relating to the meeting that the witness testified to at the Advocacy Institute, at which he testified that his father was present.

[11] Have those notes been produced here this morning?

[13] **MR. WITTEN:** They haven't and they won't be.

[15] **MR. WACHTELL:** We reserve our rights, as I set forth on the record yesterday.

[17] **MR. WITTEN:** Of course.

[18] **BY MR. WACHTELL:**

[19] **Q:** Let me go back to my question, Mr. Douglas.

[21] You stated that there was a time where you were not sure that the ABC program would air.

[24] Would you tell us when that was?

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[25] A: That is true, and it was for a

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[1] period of some months, starting from the first communication I had with ABC and extending well into the following year.

(Off the record.)

[7] VIDEO OPERATOR: Going back on the videotape record after a short power outage.

[10] The time is now 9:19, approximately.

[12] Please continue.

[14] BY MR. WACHTELL:

[15] Q: I think you were in the middle of an answer, Mr. Douglas.

[17] I had asked you when it was that you were not sure that the ABC program would air.

[20] A: The uncertainty that I had began after our first communication, when, while it was obvious there was considerable interest on the part of Walt Bogdanich, it was for some months, well into the following year, 1993, that there was a good deal of uncertainty about

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[1] whether ABC would be able to proceed with that story.

[3] Q: What did you understand the reason was for the uncertainty?

[5] A: I only understood generally, and my impression was merely that it was a new program, Day One was, and they were working out their priorities, their resources, the different kinds of shows they would be doing, and it was simply a very early developmental stage of the program.

[12] So again, for some months, it was not clear at all that it would actually proceed.

[15] Q: That was for some months after your first communication with Mr. Bogdanich in the fall of 1992; is that correct?

[18] A: Yes, it was. While the team at ABC, led by Walt, was investigating the issue from early on in the process, again, it was quite unclear — in fact, it was just basically unknown whether, ultimately, it would go ahead.

[24] Q: You say that was several months after your first communication.

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[1] Did a point in time come when, at least insofar as you understood, it became clear that the program would indeed air?

[4] A: It became clearer that it would more likely ultimately air once the green tobacco sickness segment ran in, I believe it was the fall of 1993.

[8] Q: I guess your answer is leaving me somewhat puzzled.

[10] You said that for some months after your first communication in September of 1992 it was not clear, and you now say that a year later, in the fall of 1993, it became more clear.

[15] Now, was it a few months or was it a year?

[17] A: First, I don't know that the first communication, sir, was in September of 1992.

[20] Q: I didn't say September; I said the fall — I'm sorry. I misspoke. I did say September.

[23] A: I'm trying to listen carefully, sir.

[25] Q: Yes. Thank you. I did say

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[1] September, and I think you are quite correct. I think your testimony had been the fall.

[3] A: The process was a progressive one.

[5] The investigation, again, into the nicotine manipulation issue began very early in the process, and to the best of my knowledge, coincided with and was simultaneous with the investigation into the related but separate green tobacco sickness investigation.

[11] It became clearer over the months that it would be more likely that — it was more likely that the nicotine manipulation story would be told.

[15] Again, I think in my own experience, which is fairly extensive in dealing with the media process, including the broadcast media process, there's always a level of uncertainty, oftentimes right up to the last minute, because of the nature of the business.

[21] Q: Did you understand in connection with this Day One program that there was a level of uncertainty right up to the last minute?

[25] A: I was not aware —

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[1] MR. WITTEN: A level of uncertainty about what?

[3] MR. WACHTELL: Whether the program would air.

[5] THE WITNESS: I was not aware of a level of uncertainty up to the last minute, no, sir.

[8] BY MR. WACHTELL:

[9] Q: Are you saying that once the green tobacco story had aired, that from that point on, at least insofar as you understood, it had become reasonably clear that what you call the nicotine manipulation story would air?

[14] A: It became clear, sir, because resources even at a large organization like ABC are not unlimited, and the staff, the producer, or the producers, were encumbered largely by carrying out and completing the investigation and production of the green tobacco sickness piece.

[21] Once that was complete, they were freed up considerably to then pursue, at a higher level, the other investigation.

[24] Q: By a "higher level," you mean a higher level of intensity?

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[1] A: Yes, sir. They could devote more resources to it.

[3] Q: The investigation of what you call the tobacco manipulation story had indeed been going on simultaneously with the development of the green tobacco story; is that correct?

[8] A: To the best of my knowledge, yes, sir.

[10] Q: And by the same people?

[11] A: To the best of my knowledge, sir, although there was some different staffing, I believe, depending on which you were talking about.

[15] Q: You were cooperating with them on each; is that correct?

[17] A: Yes. In varying degrees, that is true, sir.

[19] Q: As you understood, some of the witnesses that they would be going out talking to would be germane to each; is that correct?

[22] A: That is possible, sir, yes.

[23] Q: So that basically these were interrelated investigations; is that correct?

[25] MR. WITTEN: Object to the form

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[1] of the question.

[2] THE WITNESS: I believe there was some overlap. But again, I only know in a general way.

[5] BY MR. WACHTELL:

[6] Q: Let's take the point in time where the green tobacco story aired.

[8] At any time after that until February 28th, 1994, did Mr. Bogdanich, Mr. Summa, or anybody else from Day One indicate to you that there was a question mark as to whether what you call the nicotine manipulation story would air?

[14] A: My recollection, sir, is that as a general matter throughout, that question always remained present for the reasons I stated earlier.

[18] Q: I don't think you are answering my question.

[20] Did they come to you, in words or substance, at any time after the green tobacco program aired and say, "We have a problem. Someone has said maybe we should not do this broadcast. We don't have enough facts. There's a question mark as to whether the

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program will go forward," or anything of that tenor?

A: Not of that tenor, no, sir.

Q: Did they discuss with you at any time the need to clear the program with ABC News or ABC counsel-inside?

A: No, sir.

Q: Did they discuss with you when it was anticipated the program would air?

MS. ZIEVE: At any time?

MR. WACHTELL: At any time.

THE WITNESS: In a very general way, sir.

BY MR. WACHTELL:

Q: Tell me what you recall being discussed with you as to the potential timing of the broadcast.

A: It ranged anywhere from late 1993 until the first part of 1994, as I recall, sir.

Q: Let's move down, then, to the end of 1993, after the green tobacco story aired.

Did you have an understanding from your conversations with them as to when

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they anticipated that what you called the nicotine manipulation story would air?

A: Sir, only in the sense that I've just described it. That was my understanding.

Q: At any time from then forward did you ever have any more precise understanding of when the program would air?

A: Well, yes, sir. I would describe it as being in the form of a pyramid, where it became clearer as it came closer to the time, when they were then able to narrow it, for example, to February — although it was not clear precisely when it would actually air in terms of the specific date, because that depended on all sorts of scheduling considerations which I was not privy to.

Q: Did anybody ever discuss with you any of the scheduling considerations?

A: No. As I just said, not in any sort of specific way. I was just aware that there were such considerations.

Q: How did you become aware that there were such considerations?

A: I became aware of such

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considerations by being told by my colleagues at ABC that such considerations were present, and so therefore they did not know.

Q: Did your colleagues tell you what the considerations were?

A: Not more precisely than I've described them, sir. Not that I recall.

Q: Did your colleagues tell you there was any reason why it looked as if the program would be aired in February?

A: As opposed to some other month, sir?

Q: Yes.

A: No, sir.

Q: Were your colleagues enthusiastic about the program? Did they think it was going to be a big story?

MS. ZIEVE: Objection. Calls for speculation.

BY MR. WACHTELL:

Q: You can answer.

MS. ZIEVE: Only if you know.

MR. WITTEN: Object to the form.

MR. WACHTELL: Look, I am not going to put up with these kind of suggestions

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to the witness. It is highly improper.

You are not entitled to tell the witness that he should be sure not to know the answers to my questions.

You do not have to object on the grounds that my question supposedly calls for speculation or anything else.

Your role is to sit there, and, frankly, do nothing in terms of objecting to form, because I have told you conclusively on this record that you are deemed to have an objection to the form of each and every one of my questions.

What is going on —

MR. WITTEN: Herb —

MR. WACHTELL: You are interrupting me and you are raising your voice.

MR. WITTEN: You are asking a question that you should rephrase, and you ought to move on.

MR. WACHTELL: You are not entitled to tell this witness that he should be sure not to remember an answer to my question.

MS. ZIEVE: That's not what I

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said.

MR. WACHTELL: That's precisely what you said.

The caution, quote, "If you know," is a direct suggestion to your witness that he should be sure not to know.

It is highly improper. It is improper under the Rules of Maryland, which I quoted to you yesterday.

It is improper under the rules of, I think, every jurisdiction in this nation.

Will you please cease doing this?

MR. WITTEN: Herb, that was just incredibly uncalled for. It was a lousy question. Just rephrase it.

MR. WACHTELL: I want an answer to my question.

MR. WITTEN: If you re-read your question, you will know it is a bad question.

You are asking him for what was in the mind of somebody else.

Ask him for what his impression was of their behavior.

MR. WACHTELL: Roger, I will ask

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my questions. I will get answers to them. If they are improper in form, they will not be usable at the trial.

What you are engaged in and what the witness's counsel is engaged in is an improper obstruction of the deposition and signaling to the witness when you choose not to have him answer a question, or warning the witness of what you think he should not say. This is intolerable.

MR. WITTEN: I'm not doing that, Herb. You just asked a bad question.

MS. ZIEVE: Ask a good question and I won't object.

MR. WACHTELL: I'm going to get an answer to the question, and it has nothing to do with pride; it has to do with the proper way to conduct a deposition.

If we have to get a Court Master sitting here at your expense or Citizen's expense, we will do so. We are very early on in this litigation —

MR. WITTEN: We will welcome it.

MR. WACHTELL: You are interrupting me.

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MR. WITTEN: You are darn right, I am.

MR. WACHTELL: For the record, I am not going to permit this kind of signaling going on with this witness, or any other witness, and if we have to get a Court Master appointed by Judge Markow to supervise these depositions to ensure this doesn't happen, we will do so.

BY MR. WACHTELL:

Q: The pending question is, quote:

"Were your colleagues enthusiastic about the program? Did they think it was going to be a big story?"

MS. ZIEVE: My objection stands.

MR. WITTEN: Object to the form.

THE WITNESS: Well, first of all, let me remind everyone that I'm under oath, and I take the oath very seriously in answering your questions, sir.

The response to the question, to the best of my knowledge, is that the ABC team felt that it was an important story,

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and they and I worked very hard to learn as much as we

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[1] could about this subject in the months leading up to the ultimate airing of the story.

[3] In that regard, sir, I believe that calling them "enthusiastic" about it, yes, of course they were. They felt they had an important investigation they had conducted.

[7] **BY MR. WACHTELL:**

[8] **Q:** Were you ever aware that it was contemplated that the program would air at a date subsequent to February?

[11] **A:** No, sir. I knew that the date could change, but that was about the extent of my knowledge.

[14] **Q:** I'm not sure you've answered my question. Maybe you did.

[16] **A:** Could you rephrase it, please?

[17] **Q:** I'm asking you whether you were told by Mr. Bogdanich, Mr. Summa, or anybody else involved at Day One at any point that it was anticipated that the program would be airing in April — or at any date subsequent to February.

[23] **A:** Not specifically, no, sir.

[24] **Q:** That does not refresh your recollection that there was a time when the

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[1] program was anticipated to be aired at a later date and was then moved up in time to February?

[3] **MR. WITTEN:** Object to the form of the question.

[5] **THE WITNESS:** No, sir.

[6] **BY MR. WACHTELL:**

[7] **Q:** You have no recollection of that happening?

[9] **A:** Not of that at all, no, sir.

[10] **Q:** Now, you testified yesterday, and I'm referring to where we were talking about an area of the inquiry that was being made, and you testified at page 276 of the instant transcript:

[15] "I believe that they were not able to pursue that avenue of inquiry fully before February 28th, but my information on that is very general."

[19] Do you recall giving that testimony?

[21] **A:** Yes, sir.

[22] **Q:** It had to do with the question of whether anybody had ever ascertained that nicotine was being used for anything other than denaturing of alcohol, as provided for by the

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[1] Federal Regulations.

[2] Do you recall giving that answer?

[4] **A:** Yes, sir, I do.

[5] **Q:** What were you told on that score; that they had not been able to pursue that avenue of inquiry fully before February 28th?

[9] **A:** Again, sir, my recollection of that is general.

[11] I know that the ABC investigative team was in touch with the Bureau of Alcohol, Tobacco and Firearms, for example, and I recall that it was difficult to obtain full and complete information from the agency in any sort of timely manner.

[17] To say more than that, I think, on that, would be to speculate, I think, sir.

[19] **Q:** Do you recall any other areas of inquiry where you understood that they had not been able to pursue the avenue of inquiry fully before February 28th?

[23] **A:** That's a very open-ended question, sir.

[25] I don't recall anything along

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[1] those lines offhand, but if I think of something, I would be pleased to mention it later.

[4] **Q:** Do you know Anthony Collucci?

[5] **A:** Yes, I do, sir.

[6] **Q:** When did you first meet Mr. Collucci?

[8] **A:** It was after the publication of the Wall Street Journal — or pardon me; it was actually after the publication of the North Carolina newspaper series.

[12] The name of the paper slips my mind, sir, in which he played a role as a source.

[15] I spoke with him subsequent to that.

[17] **Q:** Is it correct that you sent those stories to the people at Day One, the stories that you just referred to?

[20] **A:** Yes, sir, I did.

[21] **Q:** What did you speak to Mr. Collucci about when you spoke with him?

[23] **A:** As I recall, sir, I inquired about his familiarity with the process of using nicotine as an additive in the tobacco

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[1] manufacturing process, and I don't believe that Mr. Collucci was familiar with that in particular.

[4] **Q:** What had Mr. Collucci's position been at RJR?

[6] **A:** He was a scientist there, sir.

[7] **Q:** In Research and Development?

[8] **A:** I'm not certain, sir. I believe that's probably right.

[10] **Q:** Did you understand that he had a familiarity with the manufacturing process?

[12] **A:** No, not necessarily, sir. I was inquiring just in case he did.

[15] **Q:** Did he have a familiarity with the manufacturing process?

[17] **A:** I'm not sure, sir.

[18] **Q:** What did he say to you on the subject?

[20] **A:** As I testified, he indicated to me that he was not familiar in particular with the use of nicotine in the manufacturing process, and as I recall, he told me that to learn more about that, I would need to speak with someone, I believe he said, who was a

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[1] chemist or something along those lines.

[2] **Q:** You didn't answer my question.

[3] **A:** Would you rephrase it, please?

[4] **Q:** My question was whether he indicated to you whether he was familiar with the manufacturing process.

[7] The fact that he is not familiar with nicotine as an additive is because it isn't used as an additive.

[10] **MR. WITTEN:** Objection.

[11] **MR. VLADECK:** Objection.

[12] **BY MR. WACHTELL:**

[13] **Q:** Did he indicate to you that he was familiar with the manufacturing process of cigarettes?

[16] **A:** I don't recall his indicating one way or another in that general sense, sir. That's why I didn't say he did.

[19] **Q:** But he did indicate to you that he was not aware of the use of nicotine as an additive in the process; is that correct?

[22] **A:** No, sir.

[23] **Q:** Well, you said he had no familiarity with nicotine as an additive; is that correct?

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[1] **A:** He told me, sir, that he was not familiar with the intricacies of the process, so he could not give me further insight into it, sir.

[5] **Q:** So he told you he had no awareness of nicotine being used as an additive; is that correct?

[8] **A:** I don't recall, sir.

[9] **Q:** What don't you recall?

[10] **A:** I do not recall, sir, about what he said about his specific awareness, sir.

[12] **Q:** Well, you were asking him whether he knew anything about nicotine being used as an additive; is that correct?

[15] **A:** Yes, sir.

[16] **Q:** That's why you went to talk to him; is that correct?

[18] **A:** In part, sir, yes.

[19] **Q:** He told you no he didn't; is that correct?

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[21] A: He told me that he didn't know about the manufacturing process from a technological perspective, sir.

[24] Q: That's a different answer. Are you now telling me that he

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[1] was not familiar with the manufacturing process?

[3] Is that your testimony?

[4] A: With respect to nicotine, yes, sir.

[6] Q: Well, what aspects of the manufacturing process did he tell you he was — you see, there is this latent ambiguity in your answers, Mr. Douglas.

[10] When we start with the premise that nicotine in fact is not added, the fact that the man does not have familiarity with nicotine as an additive could be said of everybody who works in the plant.

[15] What I'm trying to do is to ascertain whether you understood from Mr. Collucci whether or not he had a familiarity with the manufacturing process generally.

[20] MR. WITTEN: Object to the speech.

[22] MS. ZIEVE: Object as being argumentative. You are badgering the witness. Just ask the question.

[25] THE WITNESS: What was the

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[1] question, sir?

[2] BY MR. WACHTELL:

[3] Q: Whether you understood from Mr. Collucci whether or not he had familiarity with the manufacturing process generally.

[6] A: I did not ask him that question, sir, in my recollection, so I do not know.

[8] Q: Did you meet with him in person or was it by telephone?

[10] A: I recall it being by telephone, sir.

[12] Q: Did you ask him, "Are you familiar with the manufacture of cigarettes"?

[14] A: Not in general, sir, no.

[15] Q: You didn't ask him that question in words or substance; is that your testimony?

[17] A: I've answered your question, sir. I stand by it.

[19] Q: Please answer my question. Did you, in words or substance, ask him whether he was familiar with the manufacturing process of cigarettes?

[23] A: With respect to nicotine, yes, sir.

[25] MS. ZIEVE: Asked and answered.

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[1] BY MR. WACHTELL:

[2] Q: That is not my question. My question is:

[4] Did you ask him whether, in words or substance, he was familiar with the process of manufacturing cigarettes?

[7] MS. ZIEVE: Asked and answered.

[8] THE WITNESS: Yes, sir, with respect to nicotine.

[10] BY MR. WACHTELL:

[11] Q: That is not an answer to my question.

[13] My question is whether you asked him did he have a general familiarity with the manufacturing process.

[16] Now, please answer. Did you, in words or substance, ask him that question?

[19] A: As I said, sir, I don't recall.

[20] Q: Thank you.

[21] MR. VLADECK: Could we interrupt? (Off the record.)

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[1] BY MR. WACHTELL:

[2] Q: Now, you say that you did inquire of Mr. Collucci whether he was familiar with the manufacturing process with respect to nicotine; is that correct?

[6] A: Yes, it is, sir.

[7] Q: What did he say to you?

[8] A: That he was not familiar with the manufacturing process with respect to nicotine, sir.

[11] Q: Were those his words?

[12] A: I don't remember his precise words, sir.

[14] Q: Or did he say to you, in words or substance, that he was not familiar with anything having to do with nicotine being added in the course of the manufacturing process?

[18] A: No, sir. In fact, he said that he assumed it was.

[20] Q: We've had this little tidbit. So now you remember that; is that correct?

[23] Mr. Collucci told you that he assumed it was; is that correct?

[25] A: Yes. But he had no specific

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[1] familiarity with the processes by which that was done.

[3] Q: Did he amplify at all when he told you he assumed it was?

[5] A: No, sir, because he didn't know the process specifically, sir.

[7] Q: That's what he told you?

[8] A: Yes, sir.

[9] Q: Did he give you any indication as to where in the process he assumed it was going on?

[12] A: No, sir. He said he wasn't familiar with the process specifically.

[15] Q: Did he tell you what the basis of his assumption was, if he wasn't familiar with the process?

[18] A: No, sir.

[19] Q: Did he tell you that anyone had ever told him it was happening?

[21] A: No, sir. Not that I recall.

[22] Q: So he just gave you his unadorned assumption; is that correct?

[24] MR. WITTEN: Object to the form.

[25] THE WITNESS: I don't know if it

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[1] was his "unadorned assumption," sir.

[2] BY MR. WACHTELL:

[3] Q: Well, you asked him if he had any basis, did you?

[5] A: Yes, sir.

[6] Q: You are a lawyer; you know how to answer questions.

[8] MS. ZIEVE: Do you want him to answer? Stop interrupting him.

[10] MR. WACHTELL: Excuse me.

[11] BY MR. WACHTELL:

[12] Q: Have you answered my question?

[13] A: Pardon me. Could you rephrase it or restate it, please?

[15] Q: You asked him if he had any basis for this assumption that you say he told you; is that correct?

[18] A: Yes, I did.

[19] Q: What did he tell you when you asked him whether he had a basis for the assumption?

[22] A: I do not recall him stating a basis for his assumption, sir.

[24] Q: So as far as you know, all you had was his bare assumption, is that correct?

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[1] A: From Anthony Collucci, yes, sir.

[2] Q: Did you ever report your conversation with Mr. Collucci back to the people at Day One?

[5] A: No, sir, I don't believe I did.

[6] Q: You didn't think it was significant that this insider at RJR had told you that he had an assumption, but could not tell you any more about it?

[10] A: My understanding, sir, of this conversation is that it was with a scientist who was involved in other areas at RJR that had apparently little or nothing to do with the nicotine manipulation process per se, and the information that I conveyed to my colleagues at ABC was that which I thought was substantiated, that would be useful in the process of the investigation, and I did not consider this to be so.

[20] Q: So if you really wanted to find out what was going on in the manufacturing process, you would not think that a person who was a scientist in R&D would be the right person to go to; is that correct?

[25] A: I can't generalize, sir.

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I don't know.
Q: Excuse me?
A: I don't understand the reference to R&D, sir.
Q: Do you know what R&D means?
A: I know what it means in words, yes, sir.
Q: Is that what Mr. Collucci was involved in?
A: I don't know for certain. I believe that's right.
Q: Your understanding, based on your conversation with Mr. Collucci, was that a scientist in R&D at RJR would not be the person to go to, to really find out what was going on in the manufacturing process; is that correct?
MS. ZIEVE: Objection as to form.
MR. WITTEN: Same objection.
THE WITNESS: Sir, my understanding, general as it is, is that R&D encompasses a great many areas of science and research and development, and so it would depend, I think, on whom you were referring to.
BY MR. WACHTELL:

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Q: But in any event, here you had Mr. Collucci, who was somebody who had made accusations against his former employer, RJR; is that correct?
A: Yes, sir.
Q: Who had been a scientist at the company; is that correct?
A: Yes, sir.
Q: Had been involved in research and development; is that correct?
A: I believe so, sir.
Q: And told you that he was not in a position to give you any facts with respect to whether nicotine was being used as an additive; is that correct?
A: It is correct, sir, that Dr. Collucci would accuse, as you said, his former employer, of only those things of which he was certain, sir.
Q: Can you answer my question?
A: Yes, sir.
Q: Dr. Collucci told you that he was not in a position to give you any facts with respect to whether nicotine was being used as an additive; is that correct?

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A: Yes, that is correct.
Q: Are you saying you did not report that back to the people at Day One?
A: Not that I recall, sir.
Q: Did a point in time ever come when the people at Day One told you that they were planning to interview people at RJR?
A: I believe so, sir, yes. I know that they did, of course.
Q: What were you told?
A: As I recall, sir, I helped my colleagues at Day One develop a line of questioning, sir, for the scientists at RJR.
Q: Did you do that in writing?
A: Not that I recall, sir. We had frequent telephone conversations.
Q: Did they tell you who they were planning to interview there?
A: I'm not absolutely certain, sir.
Q: Well, they did tell you that the people were scientists; is that correct?
A: I believe so, sir.
Q: Did they tell you what they had told the people at RJR in order to line up the interview?

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A: No, sir. Not that I recall.
Q: They did not tell you how they had managed to get an interview with the people at RJR; is that correct?
A: That is correct.
Q: Did they tell you who the people were, what their expertise was, these scientists?
A: As I said, sir, I don't recall that specifically, no, sir.
Q: Do you recall it generally?
A: That they would be speaking to people at RJR.
Offhand, I do not recall whether they were going to speak with those who were scientists or other types of spokespeople whom the tobacco companies and their representatives often use.
Q: Well, did they tell you that they had told the people at RJR that they wanted people who were expert on questions of the addictive qualities of nicotine?
A: As I said, sir, moments ago, I don't recall that they told me on what basis they requested interviews with RJR.

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Q: In addition to being involved with the preparation of questions for them to ask the people at RJR, were you involved in the formulation of the request for an interview with RJR?
A: No, sir.
Q: Did you say to the people at Day One — when they told you that they were going to be interviewing scientists, did you say to them, in words or substance:
"Those probably aren't the right people to talk to. I've already talked to Collucci; he couldn't tell me about the manufacturing process"?
A: Sir, the assumption built into your question is inaccurate.
I did not know, as I recall, that they were going to interview scientists, sir.
Q: I'm reading from the screen, page 304, starting at line 23:
Question: "Did a point in time ever come when the people at Day One told you that they were planning to interview people at RJR?"

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Answer: "I believe so, sir, yes. I know that they did, of course."
Question: "What were you told?"
Answer: "As I recall, sir, I helped my colleagues at Day One develop a line of questioning, sir, for the scientists at RJR."
Are you now denying that you knew that they were planning to interview scientists?
A: Absolutely not, sir.
Q: Thank you.
A: Pardon me. Let me clarify. I may have just misspoken.
What I am explaining to you, sir, is that I was helping develop questions to be asked of scientists.
But as I said, sir, I did not know whether that was who they were going to be interviewing.
Do you understand the distinction, sir?
Q: Let the record show I'm chuckling.
A: Sir — sir, I am —

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Q: Did you tell them under —
A: Sir, I am under oath, and I will repeat that I take it very seriously, and I hope you appreciate that fact, sir.
Q: Mr. Douglas, the record of this deposition will show what it will show, and I will not comment upon my personal view of your veracity or lack thereof.
A: Thank you, sir.
MR. VLADECK: We would appreciate that.
BY MR. WACHTELL:
Q: Now, my question is: Did you, in words or substance, tell the people at Day One, when you were planning these questions for scientists at RJR, that you had previously talked to a scientist at RJR and he wasn't in a position to tell you anything about whether nicotine was used as an additive in the manufacturing process?
A: Could you repeat the question, please?
Q: I will read it back. Did you, in words or substance, tell the people at Day One, when you were

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planning these questions for scientists at RJR, that you had previously talked to a scientist at RJR and he wasn't in a position to tell you anything about whether nicotine was used as an additive in the manufacturing process?

A: Can you clarify for me, sir, whom you are referring to?

Q: Mr. Collucci.

A: And that is all? Only Mr. Collucci?

Q: In that question.

A: I did not relate, as I said earlier, Mr. Collucci's discussion with me to them at that time.

Q: Had you talked to any other scientist at RJR as to whether nicotine was being used as an additive in the manufacturing process?

(Instruction Not to Answer.)

MS. ZIEVE: You can answer, Cliff, as long as we understand that I don't think it has been established whether your client, ABC's confidential source, is a

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scientist or not, but if that person is, obviously that would be excluded from your answer.

MR. WACHTELL: No, I'm sorry; if he's going to refuse to answer, he's going to refuse to answer, but he cannot perjure himself on this record under the guise that that is a way to avoid disclosing the supposed confidential source.

MS. ZIEVE: I did not ask him to perjure himself.

He can answer fully, excluding — now, you've covered Mr. Collucci, and we are going to exclude him and Cliff's source, if that source would be part of a responsive answer.

Any other people, he can answer. It is obviously not perjury, since you know that he is excluding those two people from your question.

MR. WACHTELL: I have not excluded it from my question, so if the witness answers my question no, then the witness is committing perjury.

If you are going to direct the

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witness not to answer the question, then direct the witness not to answer my question.

I am not accepting your amendation of my question.

MS. ZIEVE: That's my instruction.

MR. WACHTELL: Well, if you are directing the witness not to answer the question, then he doesn't answer the question.

But if he's answering the question, he's answering my question and not yours.

MS. ZIEVE: I am instructing the witness not to reveal any attorney-client communications in answering the question.

MR. WACHTELL: I am making clear for the record that your instruction not to reveal an attorney-client privilege, or what you claim is an attorney-client privilege, does not give the witness license to commit perjury.

If he answers my question, I need a truthful answer.

If he isn't prepared to give a truthful answer, then you direct him not to answer the question.

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MS. ZIEVE: I don't understand what you are saying. But he has my instruction.

MR. WACHTELL: I think what I am saying is very clear. My question stands.

If I get an answer, it is an answer to my question. Nothing is being excluded from my question.

If you are not prepared to accept my question on those terms, then direct him not to answer it.

MS. ZIEVE: Cliff, don't answer the question based on attorney-client privilege.

BY MR. WACHTELL:

Q: Now, you say in your conversation with Mr. Collucci — by the way, did you only have one conversation with Mr. Collucci?

A: In my recollection, yes, sir.

Q: You say that he referred you to a chemist — was that what you said in a prior answer?

A: No, sir, I did not.

Q: Okay. Let me ask the question

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fresh.

Did he refer you to anybody else who might be in a position to know whether or not nicotine was being added in the course of the manufacturing process?

A: No, sir.

Q: Did you ask him whether he was in a position to refer you to anybody else on that subject?

A: Yes, sir.

Q: And he told you he could not; is that correct?

A: Yes, sir.

Q: Could not or would not?

A: He did not know who to refer me to, sir, according to what he told me.

Q: So basically, according to what he told you, he could not refer you to anybody who would have any knowledge or information on the subject of nicotine being added; is that correct?

A: Yes, sir. He did not know the right individuals to refer me to.

Q: You said "right individuals." I'm asking you, did he know any

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individuals who would be in a position to tell you whether nicotine was being added — or that nicotine was being added?

A: He did not know who to refer me to, sir, yes.

Q: What did he say? I would like to get your best recollection of his words.

A: I don't remember the specific words, sir.

Q: I think you indicated you told him that you were interested in knowing whether nicotine was being added during the course of the manufacturing process; is that correct?

A: It went beyond that, sir. But yes, it's correct, as far as that goes.

Q: He told you he wasn't in a position to give you facts on that; is that correct?

A: Yes, sir.

Q: Did you then say to him, in words or substance, "Well, do you know anybody else who is"?

A: Yes, sir.

Q: And he said no; is that correct?

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A: Yes, sir.

Q: Did you report that conversation back to the people at Day One?

MS. ZIEVE: Objection. Asked and answered more than once.

THE WITNESS: Yes, I do stand by my previous answer, sir.

BY MR. WACHTELL:

Q: I think it's a different question, and I would like an answer, please.

A: I stand by my previous answer.

Q: Can I get an answer to my question, please?

This question has not been asked before.

A: Can you restate it?

(Record read.)

THE WITNESS: As I said, sir, I did not report to Day One my conversation with Dr. Collucci, in my recollection.

BY MR. WACHTELL:

Q: Well, you did discuss the subject of Mr. Collucci with the people at Day

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One; is that correct?

A: The subject, sir? Could you clarify what you mean by the "subject" of Dr. Collucci?

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[5] Q: You discussed Dr. Collucci with the people at Day One; is that correct?
[7] A: Yes, sir, I did.
[8] Q: Was that discussion before or after this telephone conversation that you had with him?
[11] A: I don't recall, sir.
[12] Q: One way or the other?
[13] A: That is true, yes, sir, one way or the other.
[15] Q: Well, did you tell the people at Day One that you were going to try to see if Dr. Collucci could get you any information or get you into the plant?
[19] A: Not that I recall, sir.
[20] Q: Let me refer you to Exhibit 111, a document we were talking about yesterday; document production page LK 3600037.
[23] "Ask Tony Collucci how to get in."
[25] Does that refresh your

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[1] recollection —
[2] A: No, sir.
[3] Q: — of having a conversation on that subject with the people at Day One?
[5] MS. ZIEVE: I am going to —
[6] MR. WACHTELL: I am going to caution you, Counsel, that anything that can be construed as leading or suggesting an answer to this witness will be taken very seriously.
[10] MS. ZIEVE: I don't appreciate your instructing me on how to best advise my client.
[13] Ask your questions. I will make my objections if I have any.
[15] MR. WACHTELL: There is no proper objection to this question by any realm of any lawyer's imagination.
[18] MS. ZIEVE: I haven't stated one.
[20] MR. WACHTELL: Then it is not an objection and you should not be opening your mouth.
[23] MS. ZIEVE: As a matter of fact, when you began your speech, I was about to say go on. So why don't you do that.

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[1] MR. WACHTELL: Now that you've signaled your witness that he should be essentially alert for this question, we can go on.
[5] MR. WITTEN: This is really offensive.
[7] MR. WACHTELL: Roger, you may find it offensive.
[9] MR. WITTEN: Now you are interrupting me. You are really out of control this morning.
[12] Can't we just lower the temperature here? Ask questions and stop berating everybody in the room.
[15] MR. WACHTELL: Roger, you may find it offensive. I find it very offensive that every time I get to a subject matter which counsel deems sensitive, the words start coming out of counsel's mouth on the other side of the table with the clear intention of signaling to the witness "watch out."
[22] That is improper. You may find the fact that I am putting it on the record offensive, but I find it offensive that it is going on.

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[1] MS. ZIEVE: Since you interrupted me before I even spoke, how do you know what I was going to say?
[4] Please continue. Let's cut the speeches and let's get to the deposition.
[6] That's why you are here, isn't it? Or is it?
[8] MR. WACHTELL: Counsel, your platitudes and your strictures to me to get on with the deposition will not erase the fact that you are behaving improperly.
[12] You started to talk. The simple question was: "Does this serve to refresh your recollection?"
[15] No lawyer could think there is anything that they could properly say in the face of a question, "Does this serve to refresh your recollection," so the only reason you were opening your mouth was to signal the witness, quote, "watch out."
[21] MS. ZIEVE: Not only do I disagree with what you said about proper objections, but if you didn't consistently interrupt everybody in the room, including me, Mr. Witten, and the witness, then you might

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[1] know what it was I was going to say.
[2] You may not want to take my advice, but I suggest you move on.
[4] MR. WACHTELL: Would you answer my question, please?
[6] THE WITNESS: Sir, I have no idea what this document is, and it does not refresh any recollection of mine.
[9] BY MR. WACHTELL:
[10] Q: In your conversation with Mr. Collucci, did you make any reference, direct, indirect, of any nature, with respect to the former RJR manager that you have referred to as being your client?
[15] A: No, sir.
[16] Q: You did not, in words or substance, say to him that you had had communications with some other former RJR employee; is that correct?
[20] A: It is correct, sir. Not even remotely, sir.
[22] Q: Did Mr. Collucci, in that conversation, mention the names of any RJR people, present or former?
[25] A: Not that I recall, sir.

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[1] Q: Did Mr. Collucci give you the name of any potential person to be talked to in the tobacco industry at any company other than RJR?
[5] A: Sir, I don't believe Tony Collucci named anybody to me in any sense.
[7] Q: You testified yesterday that a point in time came subsequent to the commencement of this litigation where this person who you say was your client ceased to be your client.
[12] MR. VLADECK: Page reference, please?
[14] MR. WACHTELL: 124 and pages prior to that of the instant transcript.
[16] BY MR. WACHTELL:
[17] Q: Have you spoken to this person since that date?
[19] A: Since the date of February 28th, sir?
[21] Q: No, since the date the person ceased to be your client.
[23] A: No, I have not, sir.
[24] Q: Have you spoken to any of the people at ABC subsequent to February 28th, 1994

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[1] with respect to that RJR former manager, or the person described as an RJR former manager?
[3] A: Not that I recall, sir, no.
[4] Q: Subsequent to February 28, 1994 and the time that you came to the parting of the ways with this person described as a former RJR manager, did you — let me modify that.
[8] Did this person make any communication to you and ask you to relay it to the people at ABC?
[11] MS. ZIEVE: Object to the form.
[12] THE WITNESS: Sir, we did not have a fight, if you meant that by "parting of the ways," which is what I understand that usually to mean.
[16] We did not have a disagreement. Do you mean our parting, sir?
[18] BY MR. WACHTELL:
[19] Q: I did not suggest you had a fight.
[21] A: "Parting of the ways," sir, often means that, sir.
[23] Q: Could you answer my question, please?
[25] A: Could you repeat the question,

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[1] please?
[2] Q: After February 28th, 1994 and the time when you have said that this person ceased to be your client, did this person make any communication to you and ask you to pass it on to the people at ABC?

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[7] A: No, sir.

[8] Q: Just to be sure we are all on the same wavelength:

[10] Did this person voice to you any complaint or unhappiness with the people at ABC and ask you to convey it to the people at ABC?

[13] MR. WITTEN: Time frame of the question, please?

[15] MR. WACHTELL: Same time frame.

[16] MR. WITTEN: Thank you.

[17] MS. ZIEVE: You can answer.

[18] THE WITNESS: No, sir.

[19] BY MR. WACHTELL:

[20] Q: Did this person voice to you any request and ask you to convey it to the people at ABC?

[23] MR. WITTEN: Same time frame?

[24] MR. WACHTELL: Same time frame.

[25] THE WITNESS: Sir, to speak

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[1] comprehensively: This person conveyed nothing to me to convey in turn to ABC, sir.

[3] BY MR. WACHTELL:

[4] Q: Did you have communications with this person during that period of time?

[6] MS. ZIEVE: Which period of time?

[8] February 28th?

[9] MR. WITTEN: Honestly, the problem is you said February 28th, and then you also add in the question the time that the lawyer-client relationship ceased, and that's two dates. It's confusing.

[14] MR. WACHTELL: A period usually has a start and an end, and I cannot conceive how you could find it confusing.

[17] Can I have an answer to my question?

[19] MR. VLADECK: That's not the way you framed it.

[21] MR. WITTEN: That's not the way you framed it.

[23] BY MR. WACHTELL:

[24] Q: I will stand on my question. Please answer it.

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[1] A: Could you clarify the time frame, sir?

[3] Q: The time frame is the same time frame as the prior questions: From February 28th until the time that you came to a parting of the ways.

[7] A: And the question was, sir?

[8] Q: Did you have any communications with this person during that period of time?

[10] A: Yes, I did, sir.

[11] Q: Was there any communication about the Day One program?

[13] MS. ZIEVE: Objection. Attorney-client communication and instruct him not to answer.

(Instruction Not to Answer.)

[19] MR. WACHTELL: This witness testified at page 153 and 154 of the instant transcript that:

[22] "In the course of our dealings with one another, we eventually became journalist and source, and the communications throughout, generally speaking, the last couple

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[1] of years, have been in that capacity."

[2] I would like an answer to my question.

[4] MS. ZIEVE: Well, if it's a communication in the context of source and journalist, you can answer.

[7] If it's a communication in the course of providing legal representation, you should not answer.

[10] THE WITNESS: I'm sorry, sir. It was not separate from the lawyer-client relationship, sir, so I am unable to answer that in order to protect my client's privilege.

[15] MR. WACHTELL: This witness's testimony now is totally at variance with his testimony yesterday at pages 153 and pages 154 of the instant transcript where he said, "We did not end the relationship. The work itself has been as journalist and source."

[21] It is clear from his testimony that in the years in question, which he described as, quote, "the last couple of years," that he was not furnishing legal advice; that the relationship was that of

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[1] journalist and source, and these objections are totally unfounded by the witness's own testimony.

[4] MS. ZIEVE: The very next question you asked was if he was representing this person as a lawyer subsequent to July of 1992 and he said yes.

[8] The premise to your own question that we are talking about is prior to the time the attorney-client relationship ceased.

[11] MR. WACHTELL: I understand that the witness testified that the attorney-client relationship continued.

[14] The witness also testified that the communications they were having were as journalist and source.

[17] The fact that the person was his lawyer does not mean that the communications were in the capacity as a lawyer, and his testimony is explicit to the contrary.

[21] Now, I'm sure that you will clue him sufficiently so he will now try to modify his testimony in order to be able to assert an ongoing claim of privilege. But the record here is very clear.

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[1] I would like an answer to my question.

[3] MS. ZIEVE: In addition —

[4] MR. WACHTELL: You are interrupting me again, as you accused me of doing to you.

[7] MR. WITTEN: You are both right.

[8] MR. WACHTELL: And you are interrupting also.

[10] BY MR. WACHTELL:

[11] Q: Can I have an answer to my question?

[13] MS. ZIEVE: If you continue to page 155 of the instant transcript, it also makes clear that he was both representing her as a lawyer and having a journalist-source relationship during that time.

[18] MR. WACHTELL: I have so stated. He has testified that the attorney-client relationship did not end; on the other hand, he has testified that the communications were in the capacity as journalist and source.

[24] People can wear two hats, and the law is clear that when the hat that is

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[1] being worn is as a nonlawyer, and that is what it is, that the communications are not privileged.

[4] MS. ZIEVE: That's why my instruction represented those two hats.

[6] MR. WACHTELL: Let me be clear. I intend to ask this witness in great detail as to all communications that he had with respect to the development of the Day One program, and after the Day One program, to find out the facts of what this former RJR manager said or did not say, according to this witness's knowledge, with respect to the facts at issue in this litigation.

[15] Now, I understand your position to be, although I don't think it is well-founded, that you will not let him answer questions which you think tend to identify the confidential source.

[20] Are you now telling me that you are not going to let this witness testify to the substance of any of the communications that were had on the theory that there was an attorney-client relationship?

[25] MS. ZIEVE: Our position, which

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[1] I think is clear on the record, is simply that he is not going to answer questions, the answer to which would violate his attorney-client privilege.

[5] MR. WACHTELL: I don't want to waste hours and hours on this record if

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we are going to be blocked at every turn.

I intend to question this witness, for example:

"Did this person ever tell you that this person had any actual knowledge of nicotine being added to tobacco?"

"Did this person tell you that in the presence of the ABC people?" "Did this person tell you this outside of the presence of the ABC people?"

Now, are you going to tell me that you are going to direct the witness not to answer questions of this nature because this witness says there was an attorney-client relationship, or are you going to permit the witness to answer questions?

Very simple. Just tell me your position so we can move on.

MS. ZIEVE: I just stated it. I

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can restate it if you would like.

MR. WACHTELL: Would you restate it, please?

Are you going to let the witness answer questions of this nature?

MS. ZIEVE: If you are going to ask me a question, give me a chance to answer.

Some of the questions that you used as examples, for instance, would have implicated an attorney-client communication; some would not have.

You can ask questions as long as — you can ask any question you want, and he will answer any question that will not require him to violate the attorney-client privilege, which he simply — it's not up to him; it's up to someone else.

MR. WACHTELL: Counsel, I think the question that precipitated this colloquy was whether he had any communication after the program with reference to the program. You directed him not to answer.

Is it your position —

MS. ZIEVE: I did not direct him not to answer.

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MR. WACHTELL: Fine. Then answer, please.

MS. ZIEVE: I directed him not to answer if it invaded attorney-client privilege.

MR. WACHTELL: Let's go forward and see if this is going to be an exercise in futility or not.

BY MR. WACHTELL:

Q: Subsequent to February 28th, did you have any communication with this RJR former manager about the substance of the program that had aired?

MS. ZIEVE: Same objection and same instruction.

THE WITNESS: Without waiving the privileges, sir, I tell you that we communicated after the airing of the program on February 28th, and the nature of the communications from that date to the end of the lawyer-client relationship were, in my recollection, exclusively within the ambit and related to the lawyer-client relationship.

The program was at an end.

BY MR. WACHTELL:

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Q: Did the person tell you that the person liked the program; disliked the program? Was there any comment about the substance of the program?

MS. ZIEVE: Same objection and instruction.

THE WITNESS: I can say generally, sir, that I'm not even aware whether my client saw the program.

BY MR. WACHTELL:

Q: Did you ask?

A: No, sir.

Q: You never asked your "client," "Did you see the program"?

Is that your testimony?

MS. ZIEVE: Same objection and same instruction.

BY MR. WACHTELL:

Q: Is that your testimony?

A: I am unable to respond to that question because of the lawyer-client relationship.

(Instruction Not to Answer.)

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MR. WACHTELL: You mean a question whether he asked his client whether the client saw the program, you are claiming attorney-client privilege?

Is that your instruction? I would just like a clear record here.

MS. ZIEVE: I didn't instruct him not to answer, unless it would implicate the attorney-client privilege.

MR. WACHTELL: Every time you say that, the witness picks up on your signal and tells me he is unable to answer.

MS. ZIEVE: If you keep up on this, we are going to adjourn this and reconvene in front of a magistrate.

MR. WACHTELL: Counsel, that would probably be very welcome, because this record is clear what goes on here.

I will state it again. You say, "Of course, keep in mind attorney-client privilege," and the witness dutifully says, "I cannot answer the question."

MR. WITTEN: Let's go, then.

MR. WACHTELL: I'm going to try again, and if you are not intending to signal

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the witness, just don't say it.

MS. ZIEVE: Well, I also might want to say it because it is a valid objection.

BY MR. WACHTELL:

Q: Mr. Douglas, I am getting very weary, but I will try to hold my patience and see if we can make forward progress. But I am beginning to have very great doubt.

Did you ask this RJR former manager whether he or she had seen the program?

A: Not that I recall, sir, as I said.

Q: "Not that I recall, sir," as you never said.

Now, you testified yesterday that you were not invited to the taped interview conducted of this person by Day One.

Was there any discussion on the subject?

MS. ZIEVE: Discussion with Cliff?

MR. WACHTELL: With anyone.

THE WITNESS: If I understand your question correctly, prior to that interview, I did discuss the upcoming interview

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with my colleagues at Day One, yes, sir.

BY MR. WACHTELL:

Q: Was there a discussion as to whether you should attend?

A: I do not recall, sir. I never intended to attend.

Q: You were perfectly content to have your client subjected to a taped interview by Day One out of your presence; is that your testimony?

MS. ZIEVE: Object to the form.

THE WITNESS: My testimony, sir, is that I have absolute one hundred percent faith in the ability of Walt Bogdanich and his staff to do the best job that anyone can do on this, yes, sir.

BY MR. WACHTELL:

Q: Did you attend any interview between this RJR former manager and any of the people at Day One?

A: No, sir.

Q: Were you aware that any interview of this person by the people at Day One had occurred prior to the taped interview?

A: An interview, sir? I'm not

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sure.

Could you define the nature of "interview"?

Q: No.

A: Then I'm not certain, sir.

http://legacy.library.ucsf.edu/tid/xir07a00/pdf
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[6] Q: Would you tell me what your problem is with the word "interview"?

[8] A: Yes, sir. It can have different meanings.

[10] Q: Take it in the broadest meaning and answer my question, please.

[12] A: If it encompasses discussions, sir, yes, I believe that Day One had discussions — a discussion or discussions with my client prior to the taped interview, sir.

[16] Q: What is your information on that subject?

[18] A: Only that it occurred, sir.

[19] Q: Do you know whether it was face to face?

[21] A: I do not know, sir.

[22] Q: Do you know the duration of it?

[23] A: No, sir.

[24] Q: Do you know who participated from Day One?

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[1] A: With certainty, sir, I only know that Walt Bogdanich participated.

[3] Q: Do you know what was asked or what answers were given?

[5] A: No, sir. I could only surmise.

[6] Q: Did you ever seek to find out any of these facts?

[8] A: We discussed the nature of the subject matter.

[10] Of course, that was consistent throughout all of these months.

[12] Nothing stands out per se, based on these discussions that we are discussing, at this moment.

[15] MR. WITTEN: Can I ask the witness who he was referring to when he said "we"?

[18] THE WITNESS: Pardon me?

[19] MR. WACHTELL: I am going to pursue that.

[21] MR. VLADECK: Can we take a break in a couple minutes?

[23] MR. WACHTELL: In a couple minutes. I want to complete the line of thought here.

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[1] BY MR. WACHTELL:

[2] Q: My question is, you've talked about the fact that you really do not know, I think, the duration or what was asked or the other basic facts of what interview or interviews took place between the RJR former manager and the people at Day One prior to the taped interview.

[9] My question of you is: Did you ever ask?

[11] Did you ever seek to find out?

[12] A: Not that I recall, sir. Frankly, it was obvious.

[14] Q: What was obvious?

[15] A: What the subject matter was, sir.

[17] Q: Did you seek to find out how the interviews had gone? Interview or interviews?

[19] A: I recall being told that they were reasonably helpful.

[21] Q: Were you told anything that this person had told them during the course of any such interview?

[24] A: I don't recall specifics, no, sir.

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[1] Q: Do you recall this person having reported to you anything that this person had told them during the course of such interview?

[4] A: I do not recall anything having been conveyed that I wasn't aware of earlier.

[6] In other words, nothing was brought to my attention that I recall now that was of any special interest, sir.

[9] Q: You are not answering my question.

[11] A: The answer is no, sir.

[12] Q: The answer to the question — I want to be clear.

[14] Nothing was conveyed to you about questions that were asked or answers that were given during the course of any such interview prior to the taped interview?

[18] Is that your testimony?

[19] A: My testimony is that to protect my client, that this was handled very carefully and discreetly.

[22] No, sir, I was not aware of those kinds of specifics, that kind of information.

[25] Q: Are you saying that what your

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[1] client was telling the people at ABC was supposed to be a secret from you?

[3] A: No, sir, not necessarily.

[4] Q: Thank you. Now can I have the answer to my question? And I want to be sure we have a clear record:

[7] Is it your testimony that you do not have a scintilla of knowledge or information, as you sit here now, as to anything that this RJR former manager told the people at ABC in any interview or interviews prior to the taped interview?

[13] A: Yes, sir, that is correct, in my recollection.

[15] Q: Did you ever ask?

[16] A: No, sir. I maintained the discreetness of this whole relationship.

[18] MR. WACHTELL: This is a good place for a break.

[20] MR. WITTEN: Can we clarify the "we" answer before we break first?

[22] MR. WACHTELL: Yes.

[23] BY MR. WACHTELL:

[24] Q: You said in a prior answer, quote, "We discussed the nature of the subject

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[1] matter," or something to that effect.

[2] Who was "we" in that answer?

[3] A: I was referring to myself and Walt Bogdanich and the ABC staff, sir.

[5] MR. WITTEN: Thank you.

[6] VIDEO OPERATOR: Going off the videotape record. The time now is 10:35.

(Off the record.)

[11] VIDEO OPERATOR: Going back on the videotape record. The time now is 10:46 approximately.

[14] Please continue.

[16] BY MR. WACHTELL:

[17] Q: Mr. Douglas, I'm going to refer at times to this former RJR manager as Deep Cough, because that was the pseudonym that ABC used to refer to this person.

[21] Were you aware of that?

[22] A: I have heard that before. I didn't know that was used internally, sir.

[24] Q: Were you aware of it prior to the program?

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[1] A: Yes, sir.

[2] Q: How did you become aware of it?

[3] A: I don't recall, sir.

[4] Q: To your knowledge or information, did Deep Cough provide ABC with any document or documents?

[7] A: Not that I'm aware of, sir.

[8] Q: Did Deep Cough provide you with any document or documents other than those scheduled on the privilege log, which is Exhibit 108?

[12] A: No, sir.

[13] Q: Did you ever have any conversation with anybody at the Day One program about the potentiality or actuality of Deep Cough furnishing them with any document or documents?

[18] A: I believe so, sir.

[19] Q: Tell me what the conversation was.

[21] A: I believe we discussed the fact that we agreed, "we" being ABC's individuals and myself, that it would be helpful if any documents bearing on these issues were made available.

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[1] Q: And?

[2] A: And what, sir?

[3] Q: Was that the totality on the subject of the discussion of the potentiality of any document or documents being forthcoming from Deep Cough?

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[7] A: Yes, sir. As I said earlier, I'm not aware that any documents were forthcoming, sir.

[10] Q: My question of you is, I've asked you was there any question as to the potentiality or actuality of any document forthcoming, and you testified that you and the people at Day One agreed it would be helpful if any such documents were made available.

[16] I'm asking you: Is that the totality of any conversation that you ever had with anybody at Day One on the subject?

[20] A: Yes, sir. We may have discussed it more than once, but that is, in essence, exactly what we discussed, yes, sir.

[24] Q: Was anything done to attempt to ascertain first whether Deep Cough had any such

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[1] documents in her possession?

[2] MR. WITTEN: Same stipulation as yesterday.

[4] MR. VLADECK: Same stipulation.

[5] MS. ZIEVE: Done by whom?

[6] MR. WACHTELL: By anybody.

[7] THE WITNESS: I can't speak for the ABC staff per se, sir.

[9] For my own part, I asked and did not obtain anything beyond what you see listed in the privilege log, sir.

[12] BY MR. WACHTELL:

[13] Q: Is it your understanding that that was the totality of what Deep Cough had possession of or simply the totality of what Deep Cough was prepared to give to you?

[17] MS. ZIEVE: Objection. Assumes facts not in evidence.

[19] THE WITNESS: I'm not certain, sir.

[21] BY MR. WACHTELL:

[22] Q: Could be one; could be the other?

[24] Is that correct?

[25] A: Yes, sir.

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[1] Q: So you are saying that, as you sit here now, you do not know whether Deep Cough had documents relating to the manufacturing process which were not given to you in response to your request; is that correct?

[7] A: Yes, sir. I do not know.

[8] Q: Do you know whether the people at Day One requested documents of Deep Cough having to do with the manufacturing process?

[11] A: I believe they made such requests, yes, sir.

[13] Q: What is the basis for your belief?

[15] A: My discussions with Day One, sir.

[17] Q: What do you understand or what were you told happened in response to such requests?

[20] A: I believe that they received no documents, sir.

[22] Q: Did they indicate to you that this was a function of Deep Cough not having such documents or of Deep Cough not being willing to give to them documents that Deep

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[1] Cough did have?

[2] A: The answer with respect to ABC is the same as the answer with respect to myself, sir: I don't know.

[5] Q: One way or the other?

[6] A: That is right. Correct.

[7] Q: Did you ever seek to find out?

[8] A: Yes, sir, and I could not.

[9] Q: So you are saying it is possible, as you sit here now, that Deep Cough had possession of documents bearing upon the manufacturing process of cigarettes, that the people at Day One asked for such documents, and you understood they did so ask, and that they did not obtain them; is that correct?

[16] A: I understand, sir, that there may have been such documents, which I was not able to confirm, and I do not know that they obtained anything.

[20] Q: What is the basis for your understanding that there may have been such documents in Deep Cough's possession?

[23] A: My understanding is based on some ambiguous communications which never succeeded in isolating the answer to that

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[1] question, sir.

[2] Q: Ambiguous communications with whom?

[4] A: As you put it, sir, with Deep Cough, sir.

[6] Q: As ABC put it, Deep Cough. Thank you. So it is your present understanding that such documents may have existed in Deep Cough's possession; that ABC asked for them and did not get them?

[12] Is that correct?

[13] MS. ZIEVE: Asked and answered.

[14] THE WITNESS: To the best of my knowledge, yes, sir.

[16] BY MR. WACHTELL:

[17] Q: Was there ever a discussion with the people at ABC about the existence of any confidentiality agreement between Deep Cough and RJR and the consequence or impact thereof?

[21] MS. ZIEVE: Object to the form.

[22] THE WITNESS: I can only conjecture about conversations that ABC had with the confidential source, sir.

[25] For my own part, I do not recall

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[1] having a discussion on that issue with ABC, sir.

[3] BY MR. WACHTELL:

[4] Q: Were you aware of the existence of a confidentiality agreement between Deep Cough and RJR?

[7] MS. ZIEVE: Objection. Attorney-client privileged communications. Instruct him not to answer.

(Instruction Not to Answer.)

[13] BY MR. WACHTELL:

[14] Q: Did you discuss with ABC the existence of such a confidentiality agreement?

[16] A: Sir, I believe I answered that I do not recall such a discussion, sir.

[18] Q: Were you ever furnished a copy of such a confidentiality agreement?

[20] MS. ZIEVE: Objection. Attorney-client. Instruct him not to answer.

(Instruction Not to Answer.)

[25] BY MR. WACHTELL:

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[1] Q: Do you have a copy, in your possession, custody or control, of such an agreement?

[4] MS. ZIEVE: Same objection.

(Instruction Not to Answer.)

[8] MR. WACHTELL: I think the law is fairly clear that documents do not get insulated from production or acquire a privilege because they are handed by a client to an attorney.

[13] MS. ZIEVE: It's true if you make a request of a client, they can insulate themselves by handing the documents to their attorney.

[17] MR. WACHTELL: I'm now asking whether Mr. Douglas has in his possession, custody, or control a copy of any such confidentiality agreement.

[21] MR. VLADECK: Same objection, same instruction.

[23] MR. WACHTELL: It has been subpoenaed. It is not listed on a privilege log.

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[1] I would like to know whether it exists in his possession.

[3] If he is withholding that or any other document on an undisclosed claim of privilege, I'm certainly entitled to find out.

[6] MS. ZIEVE: You can answer as to whether or not you have a confidentiality agreement in your possession.

[9] THE WITNESS: Without waiving the privilege, sir, I do not have anything in

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http://www.industrydocuments.ucsf.edu/docs/xpxl0001

my possession that has not either been produced or indicated on the privilege log, sir.

BY MR. WACHTELL:

Q: Is there any document furnished to you by Deep Cough which is not listed on the privilege log and is located at any of your former offices?

A: As I've just stated, sir, no, sir.

Q: Well, your answer leaves a hiatus, because you told me yesterday that you did not necessarily consider yourself to be in possession, custody or control of documents at your former offices.

So I will ask the question

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again, and I would like an unambiguous answer.

Is there any document that was delivered to you by Deep Cough that presently exists, to any knowledge or information that you have, at one of your former offices?

A: No, sir.

Q: Or did exist at any time in the past, any document that is not listed on the privilege log?

A: No, sir.

Q: I'm going to refer you to Slade Exhibit 1, which is your counsel's letter to Dr. Slade's counsel, and to the third paragraph on the first page, the paragraph that starts "First."

Is it correct that whatever advice or communications you had with Dr. Slade with respect to the subject matter of that paragraph were over prior to your first communication with Mr. Bogdanich?

A: Yes, sir. The way I read this paragraph is it extended from the time period 1988 through 1991, and I did not speak to Mr. Bogdanich until the following year, sir, of 1992.

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Q: The next paragraph on this page:

"To the extent that Mr. Douglas sought Dr. Slade's expertise in the course of representing that individual."

Do you see that?

A: Yes, sir.

Q: It is a portion of a sentence. Would you tell me in what respects or whether — whether or in what respects you sought Dr. Slade's expertise in the course of representing Deep Cough?

MS. ZIEVE: Objection. Compound.

Do you want to ask him "whether" or "in what respects"?

MR. WACHTELL: "Whether and in what respects." I will stand on my question.

MS. ZIEVE: Objection. Compound.

THE WITNESS: Could you simplify the question, please?

MR. WACHTELL: Perish the thought that once during the course of this deposition you should not pick up on a signal from your counsel.

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THE WITNESS: I am an attorney.

BY MR. WACHTELL:

Q: Do you not understand my question?

A: Would you ask it again?

Q: Do you not understand my question?

A: No, I do not understand your question as put, sir.

Q: Did you seek Dr. Slade's expertise in the course of representing Deep Cough?

A: Yes, sir, I did.

Q: What expertise did you seek from Dr. Slade?

A: Without waiving the privilege, sir, generally I sought expertise from Dr. Slade regarding the issues being raised by my client with me relating to tobacco.

Q: Did you seek expertise or information from others in connection with that representation?

A: The answer, sir, is I spoke with many, many individuals, a number of whom I named here. So the answer in that respect

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would be certainly, yes, sir.

Q: You felt that you wanted factual input in order to inform you so that you could properly represent your client?

A: Yes, sir. That seems fair to say.

Q: Was that true with respect to your inquiry of Dr. Slade?

A: Yes, sir.

Q: When did you make inquiry of Dr. Slade for information that you say would help you in representing your client?

A: Dr. Slade played a special, more formal role in this case, sir, and I consulted with him shortly after the initiation of my attorney-client relationship, sir.

Q: Back in 1991?

A: Whenever it began, sir.

Q: Well, you tell me.

A: I don't believe we've specified that, and I am concerned about the attorney-client privilege, sir, in specifying the beginning date.

Q: I thought you testified to this yesterday.

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A: I'd appreciate it if we could clarify that, sir.

Q: I don't know what clarification is necessary.

I thought you testified yesterday as to when the claimed attorney-client relationship began.

MR. VLADECK: Can we have the page reference, please?

THE WITNESS: I did say, sir, that it was during my tenure at Asbill Junkin Myers & Buffone.

BY MR. WACHTELL:

Q: Fine, it was during your tenure. Now tell me your best recollection of when it was.

A: I cannot, sir. I have been instructed by my former client to do everything that I am able to do in order to protect his identity and his confidentiality, sir.

Q: Including using the word "his" if it's a lie?

A: We've discussed this, sir.

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(Instruction Not to Answer.)

MS. ZIEVE: Objection.

MR. WACHTELL: No, I'm sorry; I have not discussed this. I am not countenancing perjury on this record.

If the witness is using the word "he," I understand he means "he." If he doesn't want to mean "he," then he should use some other word.

MS. ZIEVE: He told you yesterday he was using it in a generic sense. Millions of Americans have done this for many, many years.

MR. WACHTELL: So you are representing on the record that when this witness uses the word "he," he is not necessarily referring to the male sex?

MS. ZIEVE: With respect to the confidential source, that is what he testified yesterday.

BY MR. WACHTELL:

Q: You are testifying to me that you will not give me your best recollection of when this claimed attorney-client relationship

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arose; is that correct?

A: It is protected, sir, under the attorney-client privilege.

(Instruction Not to Answer.)

BY MR. WACHTELL:

Q: When did you communicate with Dr. Slade, seeking his expertise, as you say, to help you in your representation?

MS. ZIEVE: Asked and answered.

MR. WACHTELL: No, it was not.

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THE WITNESS: I did answer, sir. I stand by my answer.

MR. WACHTELL: The question has not been answered.

BY MR. WACHTELL:

Q: Can I have an answer to my question, please?

A: Yes, sir. Could we refer back to the earlier dialogue, sir?

Q: May I please have an answer to my question?

This filibuster really has to end.

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A: I will repeat my answer, sir. It began shortly after the initiation of the attorney-client relationship, sir.

Q: When?

A: During my tenure at Asbill Junkin Myers & Buffone, sir.

Q: Can I have your best recollection of the date that you first communicated with Dr. Slade for this purpose?

A: No, sir. It's protected under the attorney-client privilege, sir.

(Instruction Not to Answer.)

BY MR. WACHTELL:

Q: You say that you had a special, more formal — or that Dr. Slade had a special, more formal role than other people from whom you sought information; is that correct?

A: Yes, sir, I did say so.

Q: Was there any agreement between you and Dr. Slade that evidences this special, more formal role?

A: Yes, sir.

Q: Was it in writing?

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A: No, sir.

Q: Would you tell me who said what to whom in forming this agreement that you just testified to?

A: Dr. Slade and I discussed the fact that I had a client whose identity was not disclosed to Dr. Slade, but whose general background he was made aware of in this context, sir.

We discussed the information that I was receiving from the client to some degree—not all of it—in order for me to receive explanation and insight that is especially within Dr. Slade's expertise on these issues, sir.

Q: You had a prior relationship with Dr. Slade; is that correct?

A: Yes, sir.

Q: You had worked closely together; is that correct?

A: Yes, we did, sir.

Q: You had joint interests in connection with tobacco and viewed things pretty much by the same lights?

A: That's fair to say, sir.

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Q: What else was said in this conversation that you are recounting to me with Dr. Slade?

A: Dr. Slade and I, sir, have spoken dozens, perhaps hundreds of times. It would be very difficult to specify.

But we discussed at some length, sir, these issues, sir.

Q: My question is: What else was said in the conversation in which you say there was a formal agreement?

A: I've described the nature of that conversation, sir.

We did discuss the formality of it and the confidentiality of it and reached an agreement whereby he would provide his expert information and insight/review to enable me to more effectively represent this individual.

Q: Tell me what was said on that subject.

You say you discussed the formality of it.

Tell me what was said.

A: We agreed, sir, that it was a formal relationship, sir.

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Q: Tell me what was said. Tell me what you said and what he said.

A: I don't recall dialogue, sir.

Q: Give me your best recollection. I would rather have your best recollection of dialogue rather than your conclusory statements.

A: Sir, it would be pure speculation.

Q: So you are telling me it would be speculation to give me the substance of dialogue?

A: Yes, sir. This is a full two years ago or more.

Q: That's your best answer to the question of what he said and what you said, in words or substance; is that correct?

A: Yes, sir. I've communicated the substance of the conversation, I believe, sir.

Q: No, I want to know your best recollection, if you have any; the best recollection of what you said to him on the subject and what he said to you on discussing the formality of the relationship.

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A: Sir, we very explicitly acknowledged that fact that I stated, and he agreed explicitly.

Q: Tell me what you stated, to your best recollection, and what he said in agreeing, to your best recollection.

A: In my best recollection, sir, I explained that this was an attorney-client arrangement in which he would act, if he chose to do so, which he did, as an expert to aid me, and to aid my client indirectly, in more effectively representing my client, sir.

Q: So your testimony is that your recollection is you actually made statements of that nature to Dr. Slade in the initial conversation you had with him on the subject; is that correct?

A: To the best of my recollection, yes, sir.

Q: It was in the initial conversation that you had with him on the subject; is that correct?

A: It would have been, sir; I believe so.

Q: What did he say?

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A: He agreed to do so, sir.

Q: You had certain information from Deep Cough, is that correct, when you called Dr. Slade?

A: Yes, of course, sir.

Q: This was information about certain manufacturing processes at RJR; is that correct?

A: Generally speaking, sir, I can say that it did relate to tobacco and manufacturing, yes, sir.

Q: You wanted to learn from Dr. Slade what he knew on those subjects; is that correct?

That was the purpose of your enlisting him?

A: Yes, sir, in part. Yes, sir.

Q: Was there any other part?

A: Dr. Slade can also — and also did provide insight into the result on people's health of these manufacturing processes, sir.

Q: Now, in terms of getting Dr. Slade's insight into the result of the manufacturing processes, was there any need for you to tell him anything having to do with the

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identity of Deep Cough?

A: No, sir.

Q: In terms of getting Dr. Slade's knowledge or information with respect to the manufacturing processes, was there any need for you to tell him anything having to do with the identity of Deep Cough?

A: No, sir. I believe he didn't want to know, as I recall.

Q: Is it your testimony now that you did not convey to Dr. Slade any information tending to reveal the identity of Deep Cough?

A: In an absolute sense, no, sir.

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[15] Q: I don't understand that answer. Will you please answer my question?

[18] A: No, sir.

[19] Q: So you were saying that you did not — to be sure we are clear:

[21] You did not convey any information to Dr. Slade which would tend to reveal the identity of Deep Cough; is that correct?

[25] A: Yes, that is correct.

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[1] Q: So you therefore have no objection to Dr. Slade testifying as to anything that he knows on that subject; is that correct?

[5] A: Sir, I would have no objection to Dr. Slade's testifying to anything which did not in any way put at risk the confidentiality of this source, this client, and the information which falls within that relationship, sir.

[11] Q: I just want to be clear: If you did not convey any information to Dr. Slade that would tend to identify Deep Cough, then any information that Dr. Slade may be in a position to testify to on the subject did not come from you; is that correct?

[18] MS. ZIEVE: Objection. Calls for speculation.

[20] THE WITNESS: It would be speculation, sir — and I decided that all on my own.

[23] BY MR. WACHTELL:

[24] Q: What was the information that Deep Cough told you about any manufacturing

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[1] process at RJR?

[2] MS. ZIEVE: Objection. Attorney-client communication. Instruct the witness not to answer.

(Instruction Not to Answer.)

[8] MR. WACHTELL: This goes back to the discussion we had earlier, where you told me you were not making that blanket objection.

[12] Now, which is it? Are you going to let me probe as to the communications between Deep Cough and Mr. Douglas on the subject of the manufacturing processes, or are you going to put a blanket objection on the record and direct him not to answer?

[19] MS. ZIEVE: I made my objection and it's consistent with what I said before.

[21] Move on.

[22] MR. WACHTELL: It is not. So we are rather at an impasse.

[24] You said before that we would deal on a question-by-question basis, and if it

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[1] did not tend to identify Deep Cough, you were not going to object.

[3] I don't think there is anything in the question I have presently put before the witness that would tend to identify Deep Cough.

[6] You are nonetheless directing him not to answer?

[8] MS. ZIEVE: That's what I said.

[9] MR. WACHTELL: Are you directing him not to answer?

[11] MS. ZIEVE: Yes, I think I said that.

[13] BY MR. WACHTELL:

[14] Q: Did you communicate to the people at ABC what Deep Cough had told you about the manufacturing processes at RJR?

[17] A: No, sir.

[18] Q: Did you communicate to the people at ABC anything that Deep Cough had told you about the manufacturing processes at RJR?

[21] A: In the most general sense, yes, sir.

[23] I will be happy to explain. I informed ABC that I might be able to identify someone who, if they were

Page 412

[1] willing, would be able to assist them with information relating to these issues.

[3] Q: Did you tell them what the nature of the information was?

[5] A: No, sir.

[6] Q: So at no time whatsoever, just so we are clear, in the course of your dealings with anybody at Day One, did you convey to them, directly or indirectly, in words, substance, implication, innuendo, or any other way, anything having to do with the manufacturing process at RJR that had been communicated to you by Deep Cough?

[14] A: I told them that such information might be available, sir, and that's where I stopped.

[17] Q: So your answer to my question, just so we are clear and we have a clear record, is:

[20] No, you did not convey in any way, shape, or form any scintilla of the actual information with respect to the manufacturing processes that had been communicated to you by Deep Cough?

[25] A: Not in my recollection, sir, no.

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[1] Q: Did you have any communication with Deep Cough on the subject of the manufacturing processes at RJR subsequent to the period where you testified at pages 154 and 155 of the instant transcript that in your dealings with one another, "you eventually became journalist and source, and the communications throughout, generally speaking, the last couple of years, have been in that capacity"?

[11] MR. WACHTELL: Let the record show that the witness is reviewing the instant transcript of his testimony at those pages yesterday.

[15] THE WITNESS: Sir, could you repeat your question, please?

[17] BY MR. WACHTELL:

[18] Q: Subsequent to the time that you have testified that the communications that you had that were in the capacity of journalist and source, did you have any communications from Deep Cough on the subject of the RJR manufacturing process?

[24] A: To be sure I understand: You are saying after we had

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[1] developed a relationship as journalist-source in addition to our lawyer-client relationship, did I have those conversations?

[4] Q: Yes, that's my question.

[5] A: Concerning the tobacco manufacturing process?

[7] Q: That's my question.

[8] A: Generally speaking, yes, sir.

[9] MR. WACHTELL: The end of a tape. We will take a break.

[11] VIDEO OPERATOR: Going off the videotape record. The time now is 11:25.

[13] This is the end of tape number 4.

(Recess.)

[18] VIDEO OPERATOR: Going back on the videotape record. The time now is 11:29 approximately.

[21] This is the beginning of tape number 5.

[24] BY MR. WACHTELL:

[25] Q: Now, would you tell me what Deep

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[1] Cough told you about the RJR manufacturing processes in such communications?

[3] A: No, sir.

[4] Q: Are you refusing to answer?

[5] A: Yes, sir. On the basis of attorney-client privilege, sir.

(Instruction Not to Answer.)

[10] MR. WACHTELL: I think the record is very clear from this witness's testimony that the communications that I am addressing in my question and asking for, by his own testimony were in the capacity as journalist and source.

[16] The fact that he may also have had an attorney-client relationship during the same period of time is irrelevant to the substance of these communications.

[20] Now, I understand that your position is that he isn't going to testify to things that he thinks might tend to identify her

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because he claims journalist-source privilege, but that's a different subject; I'm now asking him what she told him that she knew

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about the manufacturing processes, something that she purported to be telling ABC as well.

ABC has permitted inquiry on this subject, notwithstanding its claim of journalist-source privilege, except as to those matters where it claims it would tend to identify the source.

So it would seem to me that I am getting a far broader claim of journalist-source privilege from this witness even than from ABC, which is at least a journalist.

THE WITNESS: Is that a question, sir?

MR. WACHTELL: It is a statement for the record that I would like to know whether you, or you and your counsel, are taking the position that notwithstanding your own testimony that the communications in question were in the capacity of journalist and source, that you are going to refuse to answer questions as to the substance of such communications whether or not they would tend to identify the source.

THE WITNESS: No, sir —

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BY MR. WACHTELL:

Q: You are not going to refuse to answer questions on the subject —

MR. VLADECK: Could you hold a second. You are being rude. We are in the middle of a conversation.

MR. WACHTELL: Your witness was answering a question. I will not be accused of something totally without warrant.

MR. VLADECK: You saw us conversing. You saw my co-counsel ask Mr. Douglas to hold on for a minute because we may want to raise an objection, and instead of allowing us to continue to converse, you just try to engage in a dialogue with the witness. That's not proper.

MR. WACHTELL: Mr. Vladeck, the videotape will show that did not occur. You and your co-counsel were whispering to each other. There was no request of me to hold off.

MS. ZIEVE: Now we are making a request. Will you hold off?

MR. WACHTELL: Yes. And I hope you will withdraw your accusation of rudeness.

MS. ZIEVE: You can go on.

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Continue.

THE WITNESS: Sir, I will answer questions to the full extent possible, but only to the extent where it does not threaten to identify the identity of this individual, sir, or impinge on the attorney-client relationship, as to the information that was exchanged within that relationship, sir.

BY MR. WACHTELL:

Q: You understand that the time frame of my present question is the time frame which you have identified as the period in which the communications were in the capacity of journalist-source.

I am asking you as to those communications, so it would be very helpful if you did not gratuitously throw in a reference to attorney-client privilege in every one of your answers.

I am very carefully focusing you on communications that, according to your testimony, were journalist-source communications and in that capacity.

MS. ZIEVE: Objection. Argumentative. Your speech also misstates his

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prior testimony.

MR. WACHTELL: No, it doesn't, but I will let that pass. The record will speak for itself. It is in precise accord with his prior testimony.

MS. ZIEVE: I thought you were going to let it pass.

MR. WACHTELL: I will try it again.

This is going to be a very long deposition indeed, Counsel.

BY MR. WACHTELL:

Q: Is it your testimony that to answer any question having to do with information that this Deep Cough gave you as to the manufacturing process at RJR would tend to identify Deep Cough?

A: Two things, sir: First, I testified earlier that the two relationships continued simultaneously. You will see my answer was "Absolutely." I have just read that testimony at your request, sir.

In addition, I will respond to those questions, sir, to the extent that they

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do not in any way threaten to identify this source.

The privilege is not mine, sir. It is this individual's.

Q: Well, to the contrary, under the law of the journalist-source privilege, if you are a journalist, it's yours.

A: The attorney-client privilege, sir.

MR. WACHTELL: Well, I'm not going to spend time debating. The record is clear.

I will put my questions. If you want to direct him not to answer, direct him not to answer, and then we will just have to do what we will have to do.

BY MR. WACHTELL:

Q: Will you tell me, referring to the communications that you have testified were had between you and this source in the capacity of journalist-source over the last couple of years, what she told you about the manufacturing process at RJR?

A: It's very difficult to generalize, sir. I don't know how to answer

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that broad a question.

Q: I stand by my question. Would you please answer it to the best of your ability?

A: I will be as forthcoming as I can, sir.

I'm sorry. I don't know how to answer that particular question. It covers the entire universe.

Q: It is intended to. Tell me everything and anything you remember that Deep Cough told you about the manufacturing processes at RJR.

A: I will tell you, sir, and I believe this is responsive:

That ABC, Walt Bogdanich, and Keith Summa, perhaps among others—I don't know—spoke at length directly with this individual and learned everything that they felt they needed to learn from that source in particular in order to fully carry out their investigation.

My separate communications with him, with my client, with my source, are completely without relevance to that.

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The case is made without my communications being involved in this discussion.

Q: Will you please cease arguing law with me and answer my question?

A: This is a factual issue, sir.

Q: My question is: Will you please tell me what Deep Cough told you about the manufacturing processes at RJR in these communications that you had in the capacity of journalist and source?

A: No, sir. It would tend to identify this individual, sir.

Q: Any answer on that question would tend to identify the individual; is that your claim?

A: Without knowing more fully what you are looking for, sir, I don't know where to begin.

Q: Well, begin with anything that would not tend to identify Deep Cough.

A: I'm not sure what that is, sir. It would be reserved for only those who had familiarity with the process to know these

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sources — pieces of information that you are requesting, and that would instantly, I believe as a lawyer, as a human being, narrow the field significantly and help you to identify this individual, which I'm not willing to do, under the law or as a person.

MR. WACHTELL: As everybody in this room is aware, ABC itself has provided us with their taped transcript of their interview with Deep Cough, have redacted from it certain portions which they thought tended to identify her, and have never claimed that any answer to the question of communications with her with respect to the manufacturing process would tend to identify Deep Cough.

I want the record to show that this witness is taking a position that he will not give any answer to a question of any communications having to do with the RJR manufacturing process, even though ABC has conceded that it is capable of doing so without tending to identify her.

THE WITNESS: With all due respect, sir, I believe that's apples and oranges.

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MR. WACHTELL: The record is clear. No matter how many questions I were to ask you about communications from Deep Cough to you in the capacity of journalist and source and things she told you about the manufacturing process, you would refuse to answer; is that correct?

THE WITNESS: No, sir. No, sir, I have not said that, sir.

BY MR. WACHTELL:

Q: Well, then, tell me anything that she told you about the manufacturing process which in your view would not tend to identify her.

A: Nothing comes to mind without further help from you, sir.

If you would like to give me direction, I would certainly welcome it.

Q: I am not in a position to give you direction as to what you think would tend to identify Deep Cough.

This is rather a charade, Mr. Douglas, that you are concocting here.

Let me ask you these questions: Did Deep Cough ever tell you, in

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any such communications, of any knowledge that RJR was acquiring nicotine from any outside source and applying it to tobacco or reconstituted tobacco in the course of the manufacturing process of cigarettes?

A: My belief, sir, is that that would narrow it only to a handful of individuals at RJR, and I cannot disclose that, sir, under the privilege.

I think you understand that, sir.

Q: No, I most definitely do not understand anything of the sort, Mr. Douglas.

I think that's one of the most frivolous concoctions I've ever heard.

A: Thank you, sir.

Q: Is it your understanding that only a handful of people —

MS. ZIEVE: I —

MR. WACHTELL: I'm testing the witness's answer.

MS. ZIEVE: I'm trying to make a statement.

MR. WACHTELL: Go ahead.

MS. ZIEVE: I would appreciate

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it that any comments you direct to my client are in the form of questions, and please refrain from making your gratuitous comments and insults to my client.

MR. WACHTELL: Counsel, your client made a gratuitous comment to me as to what was supposedly in my mind, and I was responding so the record would be clear that I was in no way accepting that as to what I supposedly knew.

MS. ZIEVE: You have consistently made comments that are inappropriate.

Please refrain from it and just direct questions to him.

BY MR. WACHTELL:

Q: Is it your understanding that only a handful of people at RJR are familiar with the manufacturing process of cigarettes?

A: I do stand by my answer, sir. I have answered that question.

Q: No, I have not asked that question before, and you haven't answered it.

A: Perhaps I answered it before you asked it, but it was in my previous answer.

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Q: Please answer my question.

A: I have done so.

MR. WACHTELL: Reserve our rights for a ruling.

(Request to Mark Transcript.)

BY MR. WACHTELL:

Q: Is it your understanding that there are only a handful of people involved in the manufacturing process at RJR?

A: No, sir.

Q: Is it your understanding that people who are involved in the manufacturing process are not familiar with what goes on in the manufacturing process?

A: Based on the generality of your question, sir, of course that's not the case.

Q: I will ask my original question again.

In any of these supposed confidential source-journalist communications that you had with Deep Cough, did Deep Cough tell you of any knowledge that Deep Cough had as to RJR acquiring nicotine from outside

Page 428

sources and applying it to tobacco during the course of the manufacturing process?

A: Again, sir, I believe that would narrow it to a handful of individuals, so I'm unable to answer that question because it may lead toward the disclosure of the identity of this person.

Q: You were aware that ABC, on its broadcast — which you have testified, I think, you viewed; is that correct?

A: Yes, sir.

Q: — set forth what purported to be a taped portion of an interview with Deep Cough on the subject of any knowledge that Deep Cough had about the addition of nicotine to cigarettes?

A: Yes, sir. I saw what was on the broadcast, sir.

Q: If I were to ask you the same question that was asked of Deep Cough by the ABC journalist on the tape, would you give me the same answer?

A: I don't recall that question, sir.

You may ask it, if you choose.

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Q: Did Deep Cough tell you of any knowledge that Deep Cough had that extra nicotine was being added to tobacco during the course of the tobacco manufacturing process?

MR. WITTEN: Object to the form of the question.

MS. ZIEVE: Same objection.

THE WITNESS: Sir, I don't understand the question, given the language that you have used.

BY MR. WACHTELL:

Q: Did Deep Cough, in any of these communications that you claim were in the capacity of confidential source and journalist, tell you that Deep Cough had any knowledge of extraneous nicotine being added to either leaf tobacco or reconstituted tobacco during the course of the cigarette manufacturing process?

MR. WITTEN: I object to the form of the question.

MS. ZIEVE: I join in that objection.

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[23] THE WITNESS: Without waiving in any way the attorney-client privilege or the journalist-source privilege, sir, I will say

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[1] that in these communications I became aware — to be very specific, in these communications with this individual, I learned that nicotine was being used separate and apart from the tobacco itself.

[6] Once extracted, it was controlled and it was indeed added — either added or added back to the final product during the manufacturing process, sir.

[10] BY MR. WACHTELL:

[11] Q: My question is not "added back." My question is whether Deep Cough told you in any of these communications that extraneous nicotine, not originally in the tobacco raw materials that were being processed, was being added to the tobacco.

[17] MR. WITTEN: Object to the form of the question.

[19] THE WITNESS: Sir, I don't understand your use of "extraneous." I need to understand that before I can fully respond to your question.

[23] BY MR. WACHTELL:

[24] Q: You have tobacco coming into a processing plant at one end and coming out at

Page 431

[1] the other end in some form.

[2] My question is: Did Deep Cough tell you that any nicotine that was not in the tobacco materials that were entering the plant was added during the course of the process before the tobacco materials went out of the plant?

[8] MR. WITTEN: Is nicotine a tobacco material?

[10] BY MR. WACHTELL:

[11] Q: Can you answer my question, please?

[13] MR. WITTEN: I object to the form of the question.

[15] THE WITNESS: Again, of course without waiving in any way the privileges noted, I was told in the course of such communications that nicotine that ended up in the final tobacco did not necessarily come from that tobacco itself.

[21] If you choose to call that "extraneous," then, yes, sir, it was extraneous.

[24] BY MR. WACHTELL:

[25] Q: Would you tell me just what you

Page 432

[1] were told on that subject?

[2] A: I learned that there are a variety of processes by which Philip Morris, R.J. Reynolds, outside suppliers such as Kimberly-Clark's LTR Industries, Meer Corporation, Dr. Madis, and I understand others as well — a number of processes used by these various entities and others that enabled them to extract nicotine and to use it in whatever fashion they chose to do behind closed doors in their manufacturing plants, sir.

[12] Q: Did Deep Cough tell you that she had any familiarity with Philip Morris's manufacturing processes?

[15] A: I can't answer that question because of the attorney-client privilege, sir.

[17] Q: I'm talking about these communications that you have testified were in your capacity as journalist and source.

[20] A: I don't recall being told anything separately under that capacity, sir, that would enable me to answer that in a different fashion — in a different context.

[24] Q: Did Deep Cough at any time tell you that Deep Cough had been employed by Philip

Page 433

[1] Morris?

[2] A: Sir, I can't answer that question for the same reason.

[4] Q: What reason?

[5] A: The reason that it may tend to identify this individual, sir.

[7] Q: You interjected into your last answer something that you said you learned from Deep Cough that Philip Morris did, and I am asking you to tell me what it is that Deep Cough told you of any knowledge or information that Deep Cough had about what Philip Morris did.

[14] A: I learned, sir, and I will emphasize the fact that I also learned it elsewhere —

[17] Q: No, please answer my question and do not volunteer nonresponsive materials.

[19] My question is: What did you learn from Deep Cough?

[22] A: I learned from Deep Cough, and also other sources, sir, that Philip Morris is engaged in what I believe is called — if I remember correctly, the "super-critical fluid

Page 434

[1] extraction process," which they used, if I'm not mistaken, on producing Next and perhaps other cigarette products as well, sir.

[4] Q: What other source did you obtain that from?

[6] A: Dr. Slade, for example.

[7] Q: So your testimony is that Dr. Slade told you that Philip Morris was currently using the super critical fluid extraction process that it had used in making the denicotized cigarette Next; is that correct?

[13] MR. WITTEN: I object to the form of the question.

[15] MS. ZIEVE: I join in that objection.

[17] THE WITNESS: If I remember correctly, sir, the information about that process and others was conveyed to me from a number of sources, and I will tell you those whom I remember.

[22] BY MR. WACHTELL:

[23] Q: No. Let's go one by one. Did Dr. Slade tell you that Philip Morris was using the super critical

Page 435

[1] fluid extraction process that it had previously used in making the denicotized cigarette Next?

[3] A: I believe so, sir, but I'm not certain.

[5] Q: It is your best recollection that Dr. Slade told you that?

[7] Is that your testimony?

[8] A: I have answered your question, sir.

[10] Q: When did Dr. Slade tell you that?

[12] A: I have no recollection, sir.

[13] Q: In what form did he tell you that? Face to face? Written? Telephone?

[15] A: I could only conjecture. I don't recall.

[17] Q: But you are quite sure that he told you, in words or substance, that Philip Morris was using the super critical fluid extraction process that had previously been used in making the denicotized cigarette Next?

[22] A: As I've answered, sir.

[23] Q: Did he tell you that this was something he knew or something that he was surmising?

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[1] A: I don't recall, sir.

[2] Q: So you have no recollection of Dr. Slade in fact telling you that he had any knowledge that Philip Morris was using such super critical fluid extraction process; is that correct?

[7] A: As I said, sir, I recall having received that information from him, among other people.

[10] Q: Let's go step by step here. You told me that you do not recall whether he indicated it was knowledge or surmise; is that correct?

[14] A: I do not recall, sir.

[15] Q: So that you have no recollection that he in fact told you that he had any such knowledge; is that correct?

[18] A: I do not recall specifically, sir.

[20] My recollection was that it was knowledge, however.

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[22] Q: So you do recollect that he told you it was knowledge?

[24] A: As I've said, I don't recall with certainty, sir, but I do recollect that.

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[1] Q: So when I asked you whether it was knowledge or surmise, and you said you didn't recollect, you weren't giving me an accurate answer, were you?

[5] A: That was exactly accurate, sir. I don't recall which it was with certainty.

[7] Q: Do you recall which it was in any way?

[9] A: I've answered the question.

[10] Q: No, you haven't. You've given me five different answers to the same question over the last three minutes.

[13] MS. ZIEVE: I object to this.

[14] MR. WACHTELL: The witness has told me he has answered a question which he did not answer. I've gotten five different answers to this question —

[18] MS. ZIEVE: Now you are arguing with me.

[20] MR. WACHTELL: I am stating for the record in response to your statement.

[22] I will try again.

[23] BY MR. WACHTELL:

[24] Q: Is it your testimony that you do not recall whether Dr. Slade indicated that to

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[1] you as a matter of knowledge or surmise?

[2] A: I recall that it was as a matter of knowledge.

[4] I don't recall that with certainty, sir, as I've said.

[6] Q: So to your best recollection, just so we are clear now, Dr. Slade indicated to you that he had knowledge that Philip Morris was using the super critical fluid extraction process that had previously been used in connection with the denicotized cigarette Next; is that correct?

[13] A: I believe so.

[14] Q: Did he indicate to you how he had come by this knowledge from "behind closed doors," as you previously referred to?

[17] A: Not that I recall, sir.

[18] Q: Now, going back to your communications with Deep Cough:

[20] Did Deep Cough indicate to you any knowledge as to the Philip Morris manufacturing process?

[23] A: I stand by my previous answer, sir.

[25] I've been asked exactly that

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[1] question, as I recall.

[2] Q: I would like an answer to my question, please.

[4] A: I stand by my answer again, sir.

[5] Q: No, I have had refusals to answer on the grounds that it would tend to identify Deep Cough, and I would like to know just what you are testifying to here.

[9] You volunteered previously that Deep Cough told you something about Philip Morris's processes, and I now wish to see whether there was any basis for what you volunteered in that answer.

[14] Did Deep Cough tell you that Deep Cough was familiar with the Philip Morris manufacturing process or any aspect thereof?

[17] A: This individual, whom you prefer to call Deep Cough, obviously knew of the process, sir, in some respect, and I don't know more than that.

[21] Q: Did Deep Cough tell you that Deep Cough knew of the process?

[23] You say "obviously." Did Deep Cough tell you that Deep Cough had knowledge with respect to the

Page 440

[1] Philip Morris manufacturing process or any aspect thereof?

[3] A: Deep Cough knew of the process, sir, and told me that he knew of the process, sir.

[6] Q: When you say "the process," are you talking about the reconstituted tobacco process?

[9] A: Sir, you were, and I am, talking about the super critical fluid extraction process, sir.

[12] Q: You are now telling me that Deep Cough told you that Philip Morris was using the super critical fluid extraction process in connection with its manufacture of cigarettes on a current basis?

[17] A: He told me that they had that process, and if I recall correctly, that it was used, yes, sir.

[20] Q: Let's take the two separately. That's a compound answer.

[22] Deep Cough told you that Philip Morris had available to it the super critical fluid extraction process; is that correct?

[25] A: As I've testified, sir, yes,

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[1] sir.

[2] Q: Did Deep Cough tell you that it previously had been used in connection with the denicotized cigarette Next?

[5] A: I recall that being the case, sir. I don't recall that with certainty, sir.

[7] Q: Did Deep Cough tell you that Deep Cough had any knowledge as to whether that process was currently being used in connection with the manufacture of reconstituted tobacco by Philip Morris or otherwise?

[12] A: I don't recall learning that from the source, sir.

[14] Q: Thank you. Now, did Deep Cough tell you any other knowledge that Deep Cough had with respect to the Philip Morris reconstituted tobacco process?

[19] Let me reword the question for clarity.

[21] Did Deep Cough tell you any other knowledge that Deep Cough had with respect to how Philip Morris was manufacturing reconstituted tobacco?

[25] A: As I recall it, I am going to

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[1] tell you because — in the interests of full disclosure, but I don't know much, that I was told that Philip Morris might be — "might be" engaged in or have previously engaged in the use of the Kimberly-Clark/LTR reconstituted tobacco nicotine manipulation process, sir.

[7] Q: Did Deep Cough say LTR?

[8] A: As I recall, sir. Without certainty, I believe so.

[10] Q: Well, think back. Did Deep Cough ever say anything to you about LTR as distinct from Kimberly-Clark?

[14] A: One is a subsidiary of the other, sir. They were considered together, sir.

[17] Q: Did Deep Cough say anything to you about LTR as distinct from Kimberly-Clark?

[19] A: Not in my recollection, sir.

[20] Q: Now, Deep Cough did say something to you about Philip Morris being understood to use the Kimberly-Clark reconstituted tobacco process; is that correct?

[24] A: Sir, yes, and I have answered that question.

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[1] Q: Did Deep Cough tell you whether Deep Cough had any knowledge on the subject of how Philip Morris manufactured reconstituted tobacco, other than an understanding that Philip Morris used the Kimberly-Clark reconstituted paper or reconstituted tobacco process?

[8] A: I do not recall further details, sir, no.

[10] Q: So that is all that you recall Deep Cough telling you on the subject of Philip Morris and reconstituted tobacco; an understanding that Philip Morris used the Kimberly-Clark reconstituted tobacco process; is that correct?

[16] A: Yes. And after the comma, sir, I would add that I understood from this information that within the super critical fluid extraction process, Philip Morris had the technology, using that process, to remove all, or at least virtually all, of the nicotine from tobacco.

http://legacy.library.ucsf.edu/tid/xir07a00/pdf Document from the UCSF Library, http://www.industrydocuments.ucsf.edu/docs/xpxl0001

[24] Q: Well, you've managed to muddle your answer very nicely now, so I will have to

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[1] go back and clarify.
[2] Is it your understanding that the Kimberly-Clark reconstituted tobacco process is the same as the super critical fluid extraction process?
[6] A: No, sir, I don't know that to be the case.
[8] Q: In fact, you understand it to be two different things; is that correct?
[10] A: To the best of my knowledge, yes.
[12] Q: You've already told me that you do not recollect Deep Cough telling you that Philip Morris was currently using the super critical fluid extraction process in connection with the manufacture of reconstituted tobacco; is that correct?
[18] A: It is correct, and I recall, as I believe I've stated, that I was told that it was used in connection with the production of Next, sir.
[22] Q: Yes, we've established that. We've also established that you have no recollection of Deep Cough telling you that it was being currently used by Philip

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[1] Morris in connection with the manufacture of reconstituted tobacco; is that correct?
[3] A: That is correct, sir.
[4] Q: So you have testified that what Deep Cough told you that Deep Cough knew or understood with respect to Philip Morris's manufacture of reconstituted tobacco was that it was using the Kimberly-Clark paper-making reconstituted tobacco patent or process; is that correct?
[11] A: Involving the manipulation of nicotine, yes, sir.
[13] Q: Well, is there anything that you understood about the Kimberly-Clark paper-making process for reconstituted tobacco that necessarily involved any manipulation of nicotine?
[18] A: Yes. Based on Kimberly-Clark/LTR's own advertising, nicotine manipulation was directly involved in the process, and it was on that basis that they advertised the words "more or less nicotine" to its readership.
[24] Q: You've already told me that you have no recollection of Deep Cough telling you

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[1] anything about LTR as distinct from Kimberly-Clark; is that correct?
[3] A: I do not recall the distinction being made, sir, no.
[5] Q: You do not recall Deep Cough mentioning LTR?
[7] A: Yes, of course Deep Cough did mention LTR.
[9] Q: You are now telling me Deep Cough did mention LTR?
[11] A: As I said earlier, in the same context as mentioning Kimberly-Clark.
[13] Q: I don't want context; I want words.
[15] Did Deep Cough tell you that Deep Cough had any understanding of Philip Morris using any process of LTR?
[18] MS. ZIEVE: I think, if I could just — I think you two don't seem to be understanding each other.
[21] MR. WACHTELL: I'm understanding perfectly fine. This witness seeks to interject LTR every time I ask him a question about Kimberly-Clark, even though he has previously testified that he has no

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[1] recollection of Deep Cough ever mentioning LTR.
[2] MS. ZIEVE: Fine. I won't clear it up. Go on.
[4] BY MR. WACHTELL:
[5] Q: Is it correct that you have no recollection of Deep Cough ever mentioning LTR to you?
[8] A: Yes, and to be absolutely clear —
[10] Q: No, just — please, I am perfectly clear. I just wish you would answer my questions and not seek to volunteer matters that are not responsive.
[14] A: May I finish answering the question?
[16] Q: You can finish answering, and to the extent it is not responsive, I will move to strike.
[19] A: I have never been aware and I do not recall being told by this individual or anyone else—notwithstanding what might be the case, sir—that there is any separation or difference between the parent Kimberly-Clark and the subsidiary LTR, and all discussions about them were done with regard to them, sir.

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[1] Q: But whatever you thought you were aware of, Deep Cough never said to you anything about LTR; is that correct?
[4] A: I don't know how to answer the question differently, sir. I've answered it several times.
[7] Q: Did the words "LTR" ever escape Deep Cough's mouth?
[9] Try answering it that way.
[10] A: Well, I wouldn't quite put it that way.
[12] Q: I'm putting it that way. Did they?
[14] A: May I answer?
[15] Q: I wish you would. I've been trying to get the answer for half an hour now.
[17] A: Again, sir, I was told by this individual about LTR, sir, as I've explained.
[19] Q: You are saying that the individual, Deep Cough, mouthed the initials "LTR"?
[22] Please answer that question yes or no.
[24] A: If you could clarify for me, sir, how I could have been told about LTR

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[1] without the letters "LTR" being said to me, sir?
[3] Q: Please answer my question.
[4] A: The answer, again, is yes.
[5] Q: Deep Cough mouthed the letters "LTR"? Is that your present testimony?
[7] A: Well, perhaps over the telephone, you know —
[9] MS. ZIEVE: Yes or no.
[10] THE WITNESS: Yes.
[11] BY MR. WACHTELL:
[12] Q: Is your answer yes? Because you previously testified you had no recollection of this.
[15] MS. ZIEVE: Objection. Your argumentative comment, which was not a question —
[18] MR. WACHTELL: It is not an argumentative comment.
[20] MS. ZIEVE: Don't interrupt me.
[21] MR. WACHTELL: You are interrupting me.
[23] MS. ZIEVE: You were in a terrible mood this morning. You are being completely reprehensible, and it has to stop.

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[1] MR. WACHTELL: Ms. Zieve, I am not in a terrible mood. Ms. Zieve, I'm attempting to get testimony from this witness, who is making a total farce out of this deposition.
[6] You are interrupting me. I am not asking vague questions. I am asking very precise questions.
[9] This witness gratuitously answers that he does not recollect things; three minutes later he says it happened; three minutes later he says it doesn't happen; five minutes later, when you talk about Kimberly-Clark, he means it to be LTR.
[15] This witness is being evasive, and the record will show it and the videotape will show it in spades, and you are aiding and abetting him in this by your interjections.
[19] MS. ZIEVE: Despite your speech, the record will show what was and wasn't said, and there is no need to go on and on about it. We can look at the record later.
[23] Just ask a decent question, don't interrupt the witness, and let's move on.
[25] BY MR. WACHTELL:

http://legacy.library.ucsf.edu/tid/xir07a00/pdf
Document from the UCSF Library, https://www.industrydocuments.ucsf.edu/docs/xpxl0001

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Q: Mr. Douglas, is it that you do not have any recollection of Deep Cough expressing the initials "LTR," or that Deep Cough did in fact express the initials "LTR" to you?

A: As I've sought to convey, sir, to the best of my recollection, this individual did convey that information to me, yes, sir, about —

Q: No, I'm not asking you your understanding that the individual conveyed the information, because I think I understand you are trying to say that when the individual said Kimberly-Clark, you understood LTR.

That isn't the question I'm asking you.

I'm asking you a very precise, narrow question:

Did the sounds "LTR" emanate from the lips of Deep Cough in any communication with you?

MR. WITTEN: Object to the speech.

THE WITNESS: As I've said, I will say yes, again. But that is the last time

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I will answer that question, sir.

BY MR. WACHTELL:

Q: So when you previously said that you did not recollect Deep Cough saying that to you, that testimony was false?

A: Absolutely wrong.

MS. ZIEVE: Objection. Misstates prior testimony.

THE WITNESS: I'm saying to the best of my recollection, sir.

BY MR. WACHTELL:

Q: Now, what did Deep Cough tell you in any sentence that had the symbols "LTR" in it?

MS. ZIEVE: Objection. Asked and answered.

THE WITNESS: I've answered, and I have to say in this context that it is harder for me to recall and to think, frankly, given the volume of some of your questions and comments, sir.

I would like to help you, but I ask that you make it a little easier for me to respond accurately and completely, sir.

BY MR. WACHTELL:

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Q: What sentence did Deep Cough ever communicate to you that had the initials "LTR" in it?

A: I do not recall.

Q: Did Deep Cough ever communicate any sentence to you that had the initials "LTR" in it?

MS. ZIEVE: Asked and answered.

THE WITNESS: Asked and answered, sir.

BY MR. WACHTELL:

Q: I would like an answer to my question.

MS. ZIEVE: You can read it about four or five times on the record.

MR. WACHTELL: I will get four or five different answers when I do so.

I would like an answer to my question.

MS. ZIEVE: You can answer, if you want.

THE WITNESS: Yes, again, sir.

BY MR. WACHTELL:

Q: What was the sentence?

A: I don't recall a sentence, sir.

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Q: So you have no recollection whatsoever of what any sentence was by Deep Cough that had "LTR" in it; is that correct?

A: Are you trying to rattle me, sir?

Q: Mr. Douglas, can we please understand each other? I am simply trying to get testimony here. I am not trying to rattle you.

I think you are being obstructionist, but be that as it may, all I am trying to do is get a clear record.

Now, could you please answer my question:

What sentence did Deep Cough ever communicate to you that had the initials "LTR" in it?

A: I will say, for the last time, I will not answer that again, for the multiple however many times it has been, sir, period.

Q: You will not answer it?

A: Not again, sir. I've answered it. Period.

Q: Did Deep Cough ever communicate any sentence to you that had the initials "LTR"

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in it?

A: I've answered that question, sir.

Q: No, I'm sorry; this question has not been answered.

MR. WACHTELL: Is your witness refusing to testify?

MS. ZIEVE: I'm just sitting here like you.

THE WITNESS: What I'm doing, sir, is refusing to answer the same question for the -nth time.

MR. WACHTELL: I'm going to insist on an answer, and if your counsel think this deposition is being conducted in an improper manner — but as long as we are here, I am going to try to get answers to my question.

MR. VLADECK: Why don't we take a lunch break.

THE WITNESS: I've answered, and I am requesting a lunch break, sir, which is my prerogative.

So shall we break?

MR. WACHTELL: Why don't you

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show me the Maryland rule that shows that, Counsel?

We will take a break.

VIDEO OPERATOR: Going off the videotape record. The time now is approximately 12:11.

(Recess.)

VIDEO OPERATOR: Going back on the videotape record. The time now is approximately 1:17.

BY MR. WACHTELL:

Q: Mr. Douglas, referring to these communications that you have been testifying to between yourself and Deep Cough, who in those communications first raised any mention of the LTR subsidiary of Kimberly-Clark?

A: I believe I did, sir.

Q: Do you recall what you said?

A: I believe I asked whether he was familiar with this — whether he had any information about this process.

Q: By the "process," you mean the reconstitution of tobacco process?

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A: Yes, the process described in the ad.

Q: What did Deep Cough say?

A: I don't recall learning anything in particular about the process per se, except that it involved reconstituted tobacco and the manipulation of nicotine levels of that reconstituted tobacco.

As I said earlier, I believe — without certainty, I believe that Deep Cough also said to me that he believed that it might be the case that Philip Morris was using this process.

Q: Do you recall anything else said on the subject?

A: No, sir, I do not.

(Deposition Exhibit 115 referenced.)

BY MR. WACHTELL:

Q: Let me show you a document that has been produced to us from the files of defendants that I am marking as Plaintiffs' Exhibit 115 for identification, which appears to be notes of a communication bearing a date

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of March 30, 1993.

Would you take a minute and read it, please?

http://legacy.library.ucsf.edu/tid/xir07a00/pdf Document hosted at http://www.industrydocuments.ucsf.edu/docs/xpxl0001

[4] Have you ever seen this document before?

[6] A: No, I have not.

[7] Q: Does the substance of this document accord with your recollection of any conversation you had on or about March 30th of 1993 with Mr. Bogdanich?

[11] A: Not specifically, sir. But the substance is familiar to me, yes.

[14] Q: Well, do you recall discussing with Mr. Bogdanich that you were in communication with Ron Reich, who was the main tobacco and health person — along with Susan Polan, the main tobacco and health person for Ted Kennedy?

[20] A: Yes. I actually recommended that ABC speak directly to Mr. Weich—that's misspelled here—because of his familiarity with tobacco and tobacco policy and regulation issues.

[25] Q: Do you recall indicating to

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[1] Mr. Bogdanich that Senator Kennedy was planning to introduce legislation in the Congress focusing on regulation of tobacco for health and safety?

[5] A: I believe I told them that that was under consideration, but it would be a misstatement, sir, to say that Senator Kennedy was planning or anticipating doing so, because I'm not sure that it ever came to the attention of Senator Kennedy himself.

[11] Q: The first sentence of this memorandum says:

[13] "Ron Reich"—I'm not reading word for word—"with Susan Polan, drafting legislation Kennedy will introduce this Congress."

[17] You are saying your best recollection is that the statement you made was more qualified about the prospects of such legislation being introduced?

[21] A: Yes, sir. In fact, as the record will show, such legislation never was introduced, and I think this includes a supposition which would be incorrect.

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[1] Q: Going down, in any event, on this memorandum, in the second paragraph:

[3] "Ron said they would like to introduce bill by May 31 at latest and follow up with hearing. Nicotine fits in with hearings because it's a drug, and getting the FDA to regulate tobacco for health and safety is based on premise they are dealing with drugs. Focus heavily on new information that would come from my disclosures."

[11] I'm going to stop there. Do you recall having made statements of that nature in that conversation at or about that time to Mr. Bogdanich?

[15] A: No, sir. I don't know what this refers to.

[17] Q: You do not. Do you recall at or about that time indicating to Mr. Bogdanich that you anticipated that any hearing — or that hearings that might be held by Senator Kennedy would focus heavily on new information that would come from your disclosures?

[24] A: From my personal disclosures, sir? No, that doesn't sound right to me.

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(Deposition Exhibit 116 referenced.)

[4] BY MR. WACHTELL:

[5] Q: Let me mark as Exhibit 116 for identification what apparently is a press release by you, dated August 2, 1994.

[8] Are you familiar with this document?

[10] A: Yes, sir.

[11] Q: Do you see the sentence:

[12] "Douglas, who is recognized for having leveled the initial allegations regarding the tobacco industry's manipulation of nicotine, brought his allegations to ABC News in 1992 and worked with Day One during its year-long investigation which culminated in the airing of two expose segments on February 28th and March 7th, 1994."

[20] Do you see that sentence?

[21] A: Yes, I do.

[22] Q: Did you write that sentence?

[23] A: Yes, I did.

[24] Q: Directing your attention particularly to the words "brought his

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[1] allegations to ABC News in 1992," would you tell me just what were those allegations?

[3] A: They were as I've described earlier, sir; the fact that I had learned from publicly-available information that tobacco companies had, and had used, sophisticated technology to control the nicotine levels or presence of nicotine in tobacco products.

[9] Q: Is that it?

[10] A: Yes, sir. Those were the initial allegations, as it says here.

[12] Q: Well, initial or otherwise, are there any other allegations that you brought to ABC at any time prior to February 28th of 1994?

[15] MS. ZIEVE: I am going to object that that's over-broad, unless you can limit it at least to tobacco or tobacco manipulation or something.

[19] MR. WACHTELL: You can limit it to what you describe as the tobacco industry's manipulation of nicotine.

[22] BY MR. WACHTELL:

[23] Q: Did you bring any other allegations to ABC other than what you just described prior to February 28th of 1994?

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[1] A: Whether they are described as allegations or not, I'm not certain, but I do know that as I obtained additional information on the subject, I did bring it to the attention, when I could, of ABC, yes, sir.

[6] Q: Well, will you tell me what the additional information was that you brought to their attention?

[9] A: Dr. John Slade published a book about tobacco addiction with an emphasis on the pharmacologic effect — the drug effect of nicotine, and he cited information there which I brought to the attention of ABC about the fortification of tobacco, or reconstituted tobacco with nicotine; that in order to fortify it, it was being added to that material.

[18] If I'm not mistaken, I also brought to their attention —

[20] Q: Can we stop there? And I will let you complete that by telling me all the things, but I want to address my attention to what you just said about the Slade book.

[24] Was there anything in that book that you have in mind, other than the sentence

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[1] and the footnote 34 that we talked about yesterday afternoon, when you talk about the book citing fortifications and reconstituted tobacco?

[5] Let me withdraw that for a moment. I may have misspoke.

[7] Why don't you continue with your answer and I will come back.

[9] MS. ZIEVE: Do you remember where you were?

[11] THE WITNESS: If I remember correctly, I also supplied to Day One a copy of an article by a gentleman named Silberstein, who described the reconstitution process in the nicotine-related fortification process.

[16] I believe the article was from 1985, which I was made aware of, and this was in a tobacco trade publication. I believe it was Tobacco International.

[20] BY MR. WACHTELL:

[21] Q: The Silberstein article described the reconstitution process in that journal?

[24] A: Yes. Very specifically, sir,

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[1] Silberstein explained there that nicotine levels could be as much as quadrupled in reconstituted tobacco by application of the Kimberly-Clark/LTR process, sir.

http://legacy.library.ucsf.edu/tid/xir07a00/pdf Downloaded from https://www.industrydocuments.ucsf.edu/docs/xpxl0001

[5] Q: This was something that was openly described in the literature back in 1985?

[8] A: This was described in this article published in this tobacco trade publication, yes, sir.

[11] Q: In 1985?

[12] A: I believe it was in 1985.

[13] Q: So that is about nine years before this Day One broadcast?

[15] A: I don't know, sir. I don't know precisely when it was published.

[17] Q: Eight to nine years?

[18] A: Yes, sir.

[19] Q: So as far as you knew, it was not a secret; is that correct?

[21] A: That is correct.

[22] Q: Anything else that you brought to the attention of Day One?

[24] A: Well, there were things I brought to Day One's attention on a regular

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[1] basis.

[2] One of those that I remember, in addition to the ones I've mentioned, was I had received a photocopy of what appears to be a book — I don't know if it's a book, letter or book, but called "Switch Down and Quit," which describes in some detail the effect of different cigarette brand lines, giving their varying levels of nicotine and tar, on the ability of people who smoke to quit smoking if they are desiring to do so but having difficulty doing so.

[13] Q: Do you recall that at your counsels' suggestion I narrowed my question to what you brought to them within the ambit of what you described as the tobacco industry's manipulation of nicotine?

[18] I think you are now straying from that question.

[20] Is there anything else — any allegations that you brought to Day One on what you describe as the tobacco industry's manipulation of nicotine?

[24] A: The book, "Switch Down and Quit," which listed at length the tar and

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[1] nicotine levels, appeared on its face to substantiate the careful control, or, if you will, call it manipulation of the levels not only of nicotine, but also tar in these products.

[6] For example, it listed several different versions of Now cigarettes and Carlton cigarettes which had very varying levels of the drug and of the other poison, tar, notwithstanding that they were all called Now or all called Carlton. So that there obviously was some serious control over those substances.

[14] Q: Anything else you brought falling within your description of the tobacco industry's manipulation of nicotine?

[17] A: I don't recall offhand, sir, but if you wish, I will mention so later if it comes to mind.

[20] Q: Certainly. Now, the first thing you say is that you had learned from publicly-available information sophisticated techniques that were available to control levels of nicotine.

[25] That may not be word for word,

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[1] but do you recognize your answer?

[2] A: Yes, sir.

[3] Q: What specifically did you bring to the attention of Day One within that description?

[6] A: Well, at the beginning, sir, before I knew more, what I brought to their attention was the testimony of the RJR attorney, Richard Cooper, regarding the adding of extracted nicotine to what was called Premier.

[12] Q: That's what we talked about yesterday.

[14] Is there anything else that you brought to them constituting publicly-available information of sophisticated techniques, et cetera, et cetera?

[18] A: And the advertisement from Kimberly-Clark's LTR.

[20] Q: Anything else?

[21] A: I do not recall other things, no, sir.

[23] Q: Of course, you brought to them Deep Cough; is that right?

[25] Did Deep Cough fit within this

Page 469

[1] ambit of allegations that you brought having to do with the manipulation of nicotine?

[3] A: Later, sir.

[4] Q: Later. Well, I asked you both initially and later.

[7] There's nothing else you are omitting to tell me about, sir?

[9] A: Later.

[10] Q: Is there anything else you are omitting to tell me about?

[12] MR. VLADECK: Object.

[13] BY MR. WACHTELL:

[14] Q: My question was both initially, and then you answered me of things you brought later.

[17] At any time, is it correct that Deep Cough was one of the proofs, or whatever you will, that you brought to ABC in support of these allegations of the tobacco industry's manipulation of nicotine?

[22] A: I will be very specific and say that later Deep Cough contacted, directly, ABC.

[24] In other words, I did not bring that source, in the sense that it might be

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[1] interpreted as, but did help arrange that contact, yes, sir.

[3] Q: Just so we have no lack of clarity on the record, my question is going all the way up to February 28th of 1994.

[6] Is there anything else that you brought by way of proofs or potential proofs — let me just say proofs of allegations of tobacco company manipulation of nicotine to ABC?

[11] A: I recall bringing other information, for example, relating to Philip Morris's Next.

[14] And also indirectly, but for purposes of completeness, I directed ABC to sources — not confidential sources, but sources who could elaborate on this information and provide additional information.

[19] Q: By "this information," you are talking about the items you have already ticked off for me; is that correct?

[22] A: About the use of nicotine by the tobacco companies.

[24] Q: Have you already told me in this deposition all such sources to whom you

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[1] directed to ABC?

[2] A: No, I haven't named all of them. I named a list yesterday, I recall.

[5] It occurred to me later that I also referred ABC to Dr. C. Everett Koop, former Surgeon General.

[8] Q: Anybody else?

[9] A: Dr. Michael Cummings at Roswell Park Cancer Institute.

[11] Q: Anybody else?

[12] A: His colleague there, Dr. John Pauly.

[14] Q: Anybody else?

[15] A: Not offhand, sir. That's all I recall now, sir.

[17] Q: Did you take your allegations regarding the tobacco industry's manipulation of nicotine to any media person or organization other than Day One?

[21] A: No, sir. Not to my recollection.

[23] Q: Did you tell any other media organization about the person who has been referred to as Deep Cough as a potential

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[1] source?

[2] A: No, sir, not that I recall.

[3] Q: Did you take your allegations regarding the tobacco industry's manipulation of nicotine to any governmental agency?

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A: I had discussions late in the process—that is, in the months prior to airing of the first segment on February 28th—with the Food and Drug Administration, sir.

Q: I will come back to that in a minute. I just want to be sure I am covering the waterfront.

Other than those discussions that you say you had later in the process prior to February 28th of 1994 with somebody at the FDA, did you take your allegations that you describe as regarding the tobacco industry's manipulation of nicotine to any other agency of the United States government at any time?

A: No, sir.

Q: Did you take your allegations of what you describe as being the tobacco industry's manipulation of nicotine to anybody in the Legislative Branch?

A: You are asking at any time; is

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that correct, sir?

Q: At any time prior to February 28th of 1994.

A: Yes, I did, sir.

Q: Who and when?

A: It would have been in the latter part of 1993 and the beginning part of 1994 when I spoke with staff persons in congressional offices about my understanding that the tobacco industry manipulated nicotine, and that they should, in my opinion, consider legislative options for addressing this issue.

Those people would have included the offices of Representative Synar, Representative Durbin, Representative Waxman, Senator Kennedy's staff, Senator Bingaman's office.

If there are others that I think of, I will let you know.

Q: Did you bring to these people the same supporting proofs of your allegations that you brought to Day One?

A: The same initial supporting proof, sir, although much time had passed since the beginning.

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I was very careful to bring to these people in Congress only those pieces of information that I've described that were already publicly available; nothing that had been discovered anew or that was confidential in the context of my own work or the Day One investigation.

Q: Well, I must say I'm somewhat puzzled by that answer.

When I previously asked you for what you brought to Day One, you told me you brought them the testimony of Mr. Cooper of RJR with respect to Premier, you brought them the LTR ad, you brought them information about Philip Morris denicotizing cigarettes with Next and the process that was used.

You brought them whatever was in the Slade book, you brought them the Silberstein article, and you brought them a photocopy of "Switch Down and Quit."

Now, putting aside that you also set up a communication between Deep Cough and ABC, all of the items I have related that you told me about were all public; is that correct?

A: I believe so, if I heard them

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correctly, yes, sir.

Q: So you did bring all those same things to these legislative people?

A: No. No, sir, I didn't. I didn't bring all of them. What I brought, in my recollection, was a selection which included the Cooper testimony, the LTR ad — I'm not certain, but I believe I may have supplied a copy of the Slade chapter from the book, the first chapter, to perhaps a couple of the more knowledgeable staff.

I probably also included the Silberstein article in selected circumstances or instances, but I'm certain I didn't provide the whole "Switch Down and Quit" photocopy.

I'm not aware of having provided anything else, sir.

Q: Prior to the time that the Day One broadcast was broadcast on February 28th, were any legislative hearings scheduled as a result of your bringing these allegations to any of these people?

A: No, sir.

Q: At any time when you met with

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the person that has been described as Deep Cough, was anybody else present?

A: Yes, sir.

Q: Tell me such occasion or occasions.

A: It was on one occasion, sir, and my boss, my partner, Matthew Myers at Asbill Junkin Myers & Buffone, was present.

Q: Any other occasion where you met with Deep Cough where anybody else was present?

A: No, sir. I met with Deep Cough once, sir.

Q: Only once, sir?

A: Only once, sir.

Q: And that was the occasion?

A: Yes, it was, sir.

Q: I take it you did have subsequent telephone conversations, then, with Deep Cough?

A: Yes, we did, sir.

Q: In any subsequent telephone conversations that you had with the person described as Deep Cough, was there anyone else on the line?

A: I don't believe so, sir.

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Q: Is there any question in your mind on the subject?

A: There is a question in my mind; I'm not certain.

It's because there were many conversations, but it is possible.

My uncertainty lies in the possibility that there was at least one three-way call which would have been with Walt Bogdanich, but I do not know that that happened with certainty, sir.

Q: Any recollection of any call or potential call where anybody else was on the line other than Mr. Bogdanich?

MR. WITTEN: Potential call?

MR. WACHTELL: One that is potentially lurking in his recollection.

THE WITNESS: It was something I considered doing at the time, sir, which is why I am not certain.

But the answer is no.

BY MR. WACHTELL:

Q: Do you have any knowledge or information of the person described as Deep Cough ever telling whatever story she had about

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cigarette manufacturing to anyone other than you, Mr. Myers, if he was present for any part of the telling of her story, or the people from Day One?

A: Your question, just to be certain, is whether Deep Cough spoke with other individuals about this story in addition to the ones you've just named; correct?

Q: Yes. Do you have any knowledge or information of her having conveyed her story or any portion thereof to anybody else?

A: Yes, sir.

Q: How did you come by this knowledge or information?

A: Deep Cough told me, sir.

Q: What did she tell you?

(Instruction Not to Answer.)

MS. ZIEVE: Cliff, if this is information you gained in your role as an attorney for this individual, then I'm going to instruct you not to answer.

But if it is information you

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gained otherwise, you can answer.

THE WITNESS: Sir, this unambiguously was a part of the attorney-client relationship.

http://legacy.library.ucsf.edu/tid/xir07a00/pdf
Digitized by the Internet Archive
http://www.industrydocuments.ucsf.edu/docs/xpxl0001

BY MR. WACHTELL:

Q: When in point of time was it that she told you this?

A: It was in, again, late 1993 or early 1994, I believe, sir.

MR. WACHTELL: That is the period of time where the witness has indicated that although there was an attorney-client relationship, the communications were in their respective capacities as source and supposed confidential source and journalist.

THE WITNESS: Most of the time, sir.

BY MR. WACHTELL:

Q: I would like to know what the communication was.

A: Yes. As I said, the lawyer-client relationship continued into the spring of this year, and there were instances where we spoke with regard to that aspect of our overall relationship, sir.

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Q: Are you refusing to answer my question as to what you were told about other persons to whom Deep Cough told her story?

A: As far as they directly implicate the legal relationship here, yes, sir.

Q: I'm not asking for anything that directly relates to any legal relationship.

I'm asking for a simple fact, which is:

What other persons do you have knowledge or information she told her story to?

MS. ZIEVE: This has been asked, and the witness has told you he's not going to answer.

I've instructed him not to answer to the extent it would implicate the attorney-client privilege.

Do you have another question?

MR. WACHTELL: Let me see if I can narrow it. Maybe it will help, but I doubt it, given your attitude.

BY MR. WACHTELL:

Q: The other person or persons to whom Deep Cough told all or part of her story,

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were any of them connected with any media organization?

A: No, sir. Again, the relationship — rather, the communication that we are discussing was one that bore on this individual's legal rights and concerns, sir.

Q: I'm afraid I don't know whether you have or have not answered my question.

I don't know if you have answered my question or refused to answer my question.

Have you answered my question or are you refusing to answer the question?

MR. VLADECK: If you look at the transcript, he said "No, sir," and then he explained his answer.

The transcript is right in front of you.

MR. WACHTELL: I see the transcript, and I don't know whether "No, sir" means he is not going to answer my question or whether it means, "No, it was not anybody in the media."

THE WITNESS: I simply answered

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your question whether it was regarding anybody in the media, sir.

No, sir.

BY MR. WACHTELL:

Q: It was not anybody in the media?

A: That's correct.

Q: If you would have stopped there, we could have moved on.

A: I will seek to do so, sir.

Q: Was it somebody connected with government?

A: I'm unable to answer, sir, because of the attorney-client relationship.

(Instruction Not to Answer.)

BY MR. WACHTELL:

Q: When, in point in time, was it that you understand a communication to have taken place between Deep Cough and somebody in the government which you are not willing to disclose to me?

MS. ZIEVE: Object to the form.

MR. WACHTELL: I'm doing the best I can with the form to try to skirt all

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these claims of privilege here.

MS. ZIEVE: Let's skip your commentary here.

BY MR. WACHTELL:

Q: Can I have an answer to my question?

When is it that you have some understanding, which you are not prepared to go into, that Deep Cough told all or part of her story to somebody in government?

MR. WITTEN: Object to the question.

MS. ZIEVE: He never said that he had such an understanding.

MR. WACHTELL: I'm entitled, on the issue of malice in this litigation, to seek to find out whether this person took her story to other people who thought it amounted to a hill of beans and ABC turned it into a mountain.

Therefore, I am entitled to seek to ascertain the timing, and anything else I can find out about it, because it is very critical to the issue of malice.

Now, if in fact you are going to

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refuse to let the witness enlighten us on this subject, so be it, but at least I want the record to be clear that you are refusing to let the witness enlighten us on this subject.

MS. ZIEVE: I didn't instruct the witness not to answer this question.

My objection was that you misstated his testimony, which is true.

BY MR. WACHTELL:

Q: Tell me your best knowledge or information as to the timing of any communication that may have taken place between Deep Cough and any governmental person.

A: It was, again, sir, either in the latter part of 1993 or in the early part of 1994, or both.

Q: Can you tell me any knowledge or information you have as to who in the government that was?

A: I misspoke. If I misunderstood your question, sir, to involve the government, then I didn't hear it correctly.

I did not intend to say that it affected communication with the government, sir.

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Q: Well, I will try again. The communication that you have referred to that took place, as you understand, in late '93 or early '94, that you have told us was not with any media representative, I'm now asking you, was it with a governmental representative?

A: I will say, sir, based on the judgment which I've just arrived at, and I hope is in the best interests of my client, that the communication was with the government.

The communication involved strictly legal matters in terms of my involvement in this, and the reason that the client related that to me was with regard to legal representation.

I state that very circumspectly and without any intention whatsoever of waiving the attorney-client privilege, sir.

Q: Do you know what agency, or agencies, of the government was involved?

A: Yes, I do.

Q: Would you tell us?

A: It was the Food and Drug Administration, sir.

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Q: Did you accompany the person described as Deep Cough?

A: No, sir. I've only seen Deep Cough once, as I've noted, sir.

Q: You have referred previously that you—I think you said later in the process, prior to February 28th, 1994—

http://legacy.library.ucsf.edu/tid/xir07a00/pdf Document hosted at http://www.industrydocuments.ucsf.edu/docs/xpxl0001

took your allegations to the Food and Drug Administration; is that correct?

[10] A: Yes, sir.

[11] Q: Who did you speak with there?

[12] A: I have spoken with an associate commissioner named Jerry Mande, and was contacted by an agent there, sir, whose name is Gary Light.

[16] Q: Did you furnish various proofs to these people, or what you considered to be proofs of supposed tobacco company manipulation of nicotine?

[20] A: Yes, I did, sir.

[21] Q: Were those substantially the same materials that you had furnished to Day One?

[24] A: They were closer, in actuality, to what I had furnished congressional

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[1] representatives, sir.

[2] Q: So it was included within the materials that you had furnished to Day One, but not necessarily all of them; is that correct?

[6] A: Yes, sir, that is correct.

[7] Q: Are there various documents—memos, retained copies, faxes, or the like—evidencing what you furnished to these gentlemen at the FDA?

[11] A: If there is, sir, it is in the documents that have been produced already.

[13] I don't recall anything in particular, sir.

[15] MR. WACHTELL: If there exists any memoranda, notations, faxes or the like evidencing communications with the FDA, we would certainly call for them to be produced.

(Request for Production.)

[22] BY MR. WACHTELL:

[23] Q: What then transpired between yourself and the people at the FDA, if anything?

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[1] A: I had discussions with these individuals about — there were two parts, sir.

[3] I had discussions with these individuals about some of the information of which I was aware dealing with nicotine manipulation. The focus was quite specific in that regard. It was on tobacco and health generally, in other words.

[9] In addition, in my role — quite apart from the source, but in my role as a colleague with ABC, I sought to assist ABC in scheduling an interview with the FDA Commissioner, David Kessler.

[14] Q: Were you successful in that?

[15] A: No, I was not, sir.

[16] Q: Apart from seeking to schedule an interview, and going to your discussions of information with respect to nicotine manipulation, will you tell me what went on between yourself and Mr. Mande or Mr. Light?

[21] Are those the only two people you communicated with at the FDA on this subject?

[24] A: I am almost certain that is the case, sir.

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[1] Q: Tell me what went on in any discussions that you had on the subject of nicotine manipulation.

[4] A: Well, after providing the information which I described to them, I subsequently spoke with the source, the confidential source, who then separately made contact with the FDA.

[9] So I was able to, in that regard, facilitate that happening.

[11] But the communication was direct between those parties, and I was not involved.

[13] Q: So the communication that Deep Cough had with the FDA, in your understanding, was with the same people that you were talking to?

[17] A: I'm only aware of communication being between Deep Cough and Mr. Light, sir.

[19] Q: Did Mr. Light or Mr. Mande or anybody else at the FDA ever recount to you anything that Deep Cough had told them?

[22] A: No, sir. They were very clear on that, sir.

[24] Q: Did they ever tell you anything about what was going on at the FDA with respect

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[1] to any information you gave them or Deep Cough gave them?

[3] A: No, sir. Their reaction generally was "Thank you very much. We would be glad to hear anything you have to tell us."

[7] Q: Did they indicate to you that they were planning on taking any action based on the information?

[10] A: No, sir, they did not.

[11] Q: Did you at any time tell them, in words or substance, "You really ought to consider doing something because Day One is coming out with this expose"?

[15] A: No, sir, I did not communicate that to them.

[17] Q: Did you hope that the program that Day One was going to broadcast would galvanize the FDA into action?

[20] A: In my wildest dreams, yes, sir, I did hope that something like that would happen.

[23] Q: Is it correct that your wildest dreams came true?

[25] A: I'm not certain, sir.

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[1] The timing of the Day One broadcast and the FDA letter to the Coalition on Smoking OR Health was obviously very close.

[4] I felt that, personally — it was a personal opinion, sir, that FDA may have sought to make its announcement before ABC did, but that was conjecture, and I don't know whether that was the case, sir.

[9] Q: Well, look at Exhibit 116, the second page.

[11] A: Yes, sir.

[12] Q: The footnote that appears in italic type at the bottom of the press release, did you write that?

[15] A: Yes, sir.

[16] Q: Quote: "Mr. Douglas persuaded ABC News in 1992 to investigate the tobacco industry's manipulation of nicotine, then assisted ABC's Day One during its year-long investigation.

[21] "The resulting exposes helped spur a major shift in U.S. government policy when the U.S. Food and Drug Administration announced in February 1994 that it would, for the first time, consider regulating tobacco

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[1] products as drugs."

[2] I'm going to stop reading there.

[4] When you wrote that, did you believe that to be true?

[6] A: Yes, sir. This, of course, was my conjecture, and I believed, and frankly hoped it to be true, yes, sir.

[10] Q: Do you still believe it to be true?

[12] A: I believe it to be true, yes, sir.

[14] Q: Now, did you take any notes of any communications with Deep Cough or tape any such communications?

[17] A: Yes, sir; I never taped any communications, but I did take notes now and then.

[20] Q: Were those notes retained?

[21] A: To the extent that they are reflected in the production of documents and the privilege log, yes, sir.

[24] Q: Other than that?

[25] A: No, sir.

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[1] Q: Let me direct your attention to the privilege log, which is Exhibit 108.

[3] I would direct your attention to the fourth, fifth, sixth, seventh items, either being a handwritten note of a telephone conversation or a typed note of a telephone conversation; is that correct?

[8] A: Yes, I believe I see what you are referring to, sir.

http://legacy.library.ucsf.edu/tid/xir07a00/pdf
Downloaded from www.industrydocuments.ucsf.edu/docs/xpxl0001

[10] Q: Two of these, at least, are in the time span 1993, and the other two are undated.

[13] Were those likewise between the January 27th date indicated for the fourth item and the May 27th date indicated for the seventh item?

[17] A: I do not know, sir.

[18] Q: Were they during the period of time, where, as you've testified, the communications you were having with Deep Cough were in your capacity as confidential source and journalist?

[23] A: I can't tell from this log, sir.

[24] Q: The log doesn't refer to attorney-client privilege with respect to these

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[1] documents as a reason for withholding the document; is that correct?

[3] A: Yes, sir.

[4] Q: Are there materials or substance of communications being made to you by Deep Cough as reflected by those notes that could be produced without revealing Deep Cough's identity?

[9] A: I would have to review these documents, sir.

[11] MR. WACHTELL: We would ask that that be done, and any and all portions thereof that can be produced without revealing Deep Cough's identity be produced, without prejudice to our position, of course, that there is no privilege here at all.

(Request for Production.)

[20] BY MR. WACHTELL:

[21] Q: Did you provide the people at ABC with any questions that they should put to Deep Cough?

[24] A: I don't recall specifically, sir.

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[1] Q: Do you recall generally?

[2] A: I can say that I may have.

[3] Q: Did you do so in writing?

[4] A: No, sir. I don't recall doing so in writing.

[6] Q: 107 for identification, if you will take a look at it, which is your May 1994 special report:

[9] Let me direct your attention to page 4 of this document. I think we were looking at page 6 yesterday.

[12] At the top of the second column on page 4:

[14] "Tobacco manufacturers add substantial quantities of nicotine to their products that they have purchased from other sources, including firms which specialize in extracting and processing nicotine and other substances."

[20] Now, we talked yesterday about denatured alcohol, and I'm going to ask you to exclude anything having to do with denatured alcohol from your answer to my question.

[24] My question is: What other basis did you have

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[1] for this paragraph?

[2] A: It was based on the Day One investigation, sir.

[4] Q: When you say, "on the Day One investigation," do you mean what appeared on the air on the Day One program?

[7] A: Yes, sir, the references to Dr. Madis and Meer Corporation and other suppliers, sir.

[10] Q: Other than what appeared and was broadcast on the air by Day One, and other than anything having to do with denatured alcohol, those were your sole sources for this paragraph?

[15] A: I would add to that, sir, my belief, although it wasn't essential to this paragraph, that the Kimberly-Clark/LTR process was involved in the same thing.

[19] Q: You've told me everything now that was a basis for your writing this paragraph?

[22] A: I believe so, yes, sir.

[23] Q: Now, I asked you yesterday whether you had any knowledge or information that Philip Morris was in fact purchasing any

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[1] reconstituted tobacco from LTR, and I think I have your answer to that on the record, but I'm not sure whether or not I asked you whether you ever told anyone at ABC that you had any knowledge or information that Philip Morris was in fact buying any reconstituted tobacco from LTR, or from Kimberly-Clark, for that matter.

[8] A: I'm not certain, sir, and the date is relevant.

[10] I don't recall precisely when I learned that that might be the case.

[12] It may have been after the show already had aired, sir.

[14] Q: Well, let's go back to before February 28th of 1994.

[16] Did you ever tell anyone at ABC that you had any knowledge of Philip Morris buying any reconstituted tobacco that was produced by LTR or Kimberly-Clark?

[20] A: Not in my recollection, sir.

[21] Q: And you did not have any knowledge or information prior to that time of any such fact; is that correct?

[24] A: I'm not certain that I did, sir, that is correct.

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[1] Q: You referred earlier this afternoon both to the Kimberly-Clark ad and to an article by Silberstein; is that correct?

[4] A: Yes, sir.

(Deposition Exhibit 117 referenced.)

[8] BY MR. WACHTELL:

[9] Q: I think we marked the Kimberly-Clark ad yesterday as 109, and I'm going to mark as Exhibit 117 a document that has been produced to us from the files of the defendant bearing document production numbers 1020924 through 4.

[15] It is headed "Flavouring Reconstituted Tobacco," by Donald A. Silberstein.

[18] There is a handwritten notation that it's from the Tobacco Journal International.

[21] Is this the article to which you refer?

[23] A: Yes, it is, sir.

[24] Q: Did you refer the people at Day One to this article?

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[1] A: I believe I did so, sir, yes.

[2] Q: Directing your attention to the two paragraphs in this article headed "Nicotine Fortification," do you see that?

[5] It's on the third page of the article.

[7] A: Yes, sir.

[8] Q: "The flexibility of the two-step Kimberly-Clark process allows for many changes in the chemical properties of the finished reconstituted tobacco sheet.

[12] "One change that should be discussed when speaking of flavor is the fortification of the nicotine content of the finished sheet.

[16] "Though standard reconstituted tobacco products contain .7 to 1 percent nicotine, LTR Industries offers the possibility of increasing the nicotine content of the final sheet to a maximum of 3.5 percent."

[21] Do you see that language?

[22] A: Yes, sir.

[23] Q: Was that the language that you had in mind when you previously referred me to Mr. Silberstein's article?

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[1] A: I did have this language in mind, yes, sir.

[3] Q: Did you know anything else about LTR or what could or could not be done with the process that LTR utilized, other than what was in the ad which was marked yesterday as 109 and other than what was in this article?

[8] A: The segment you just read and the following language after that segment,

http://legacy.library.ucsf.edu/tid/xir07a00/pdf Document from the UCSF Library, http://www.industrydocuments.ucsf.edu/docs/xpxl0001

plus the ad, were, in my recollection, what I knew about the LTR Kimberly-Clark process, sir.

Q: That was the totality of your knowledge?

A: As far as I recall, yes, sir.

Q: This article by Mr. Silberstein — is it Mr. Silberstein or Dr. Silberstein?

I don't know which it is, but I don't mean to slight the gentleman if he is a doctor.

A: It appears he is with LTR Industries.

Q: Maybe they have some doctors on their staff.

This article says, "LTR

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Industries offers the possibility of increasing the nicotine content in the final sheet."

Is that correct?

A: Yes, sir.

Q: You understood that to mean that one could do it if one wanted to, is that correct, use the process in that way?

A: Yes, sir.

Q: The corollary of that was that if one did not want to do that, one did not have to do that in using the process; is that correct?

A: Yes, sir. Yes, sir.

Q: You have also testified that it is your understanding that Philip Morris had licensed the Kimberly-Clark technology, paper-making technology, and utilized it in its reconstituted tobacco operation; is that correct?

A: I've stated that I was told that that might be the case —

Q: Might be.

A: — that they did access this process.

Q: The process being the

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Kimberly-Clark paper-making process; is that correct?

A: The Kimberly-Clark and LTR process, sir, including the nicotine aspect of the process.

Q: Including what you understood from the Silberstein article was that it was possible to utilize the process to add nicotine; is that correct?

A: Yes, sir.

Q: Did you have any knowledge or information that Philip Morris was in fact, in its reconstituted tobacco operation, using this process to increase the nicotine content of the natural raw materials that went in the factory entrance for use in reconstituted tobacco?

A: In the fashion that the word "increase" is used here, I was told, sir, that that might be the case.

Q: Who told you this?

A: As I said, I was told that it might be the case by the person you refer to as Deep Cough, sir.

Q: So you are saying that Deep

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Cough, just to be sure we are clear, told you that it might be the case that Philip Morris, in the course of producing reconstituted tobacco, was adding nicotine, in addition to the nicotine which naturally occurred in the raw materials coming in at the front end of the reconstituted tobacco plant; is that what you are telling me?

MR. WITTEN: May I have a moment to read the question, please?

Thank you. I object to its form.

BY MR. WACHTELL:

Q: You can answer.

A: The reference to a reconstituted tobacco plant, sir, doesn't make sense to me.

If you could clarify, please?

Q: "Plant" is not a growing plant; "plant" is a manufacturing plant, if there is any lack of clarity.

A: That helps, sir. Thank you.

Q: I wonder whether that was really necessary.

A: My understanding of what it says

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here, sir, in Silberstein's article, and my understanding from what I was told in the "might be" way that I was told by Deep Cough, sir, is not that the nicotine level, using this process, was increased beyond what the reconstituted material had as it entered the plant, sir, but rather, once it had been reconstituted into a sheet, that the nicotine level at that point was considerably lower than it could be made by using this process, sir.

Q: I don't think you are answering my question.

A: Could you please rephrase the question, then?

Q: Did Deep Cough tell you that it might be the case that Philip Morris, in the course of manufacturing reconstituted tobacco, was introducing into the process extraneous nicotine, other than the nicotine that was in the raw materials; the tobacco leaves, fragments, stems, or the like that were the raw materials of the process?

MR. WITTEN: I object to the form of the question. It's misleading.

THE WITNESS: If I understand

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your question, sir, then let me answer that yes, he told me that that might be the case.

BY MR. WACHTELL:

Q: And the corollary is that Deep Cough did not tell you that he knew this to be the case?

A: Exactly right, sir.

Q: Did Deep Cough tell you that it might be the case, in the same sense that Silberstein is using it, that it is possible to use the process in that way?

A: Deep Cough and I, both knowing from our different perspectives that this is the case, understood that that was possible, yes, sir.

Q: So Deep Cough, to be sure I understand, was telling you that knowing the technology that Philip Morris used, which was the Kimberly-Clark technology, that it was possible to use their technology and add extra nicotine, as Silberstein is saying here; is that correct?

A: Deep Cough did say with reference to Kimberly-Clark and LTR together, sir, as an entity, that that was possible as

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described here.

Although my impression, too—not although, but in addition—was that Deep Cough had further information, but which I was not made aware of.

Q: Did Deep Cough tell you that Deep Cough had any further information on the subject of Philip Morris introducing any extraneous nicotine, other than the fact that Philip Morris utilized the Kimberly-Clark paper-making technology which Silberstein was saying could be used, it was possible, to add extra nicotine?

MR. WITTEN: I object to the form of the question.

THE WITNESS: Deep Cough did not tell me explicitly that he had further information.

As I said, it was my impression that that might be the case, sir.

BY MR. WACHTELL:

Q: It was your "impression" that this "might be the case," but Deep Cough never told you that, is that correct?

A: No, sir. Deep Cough said that

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that might be the case.

Q: Deep Cough said it was possible that Philip Morris could use the technology and add extra nicotine; is that correct?

A: Used the word "might," and perhaps said "possible" as well, sir, yes.

http://legacy.library.ucsf.edu/tid/xir07a00/pdf
Document from the UCSF Library, http://www.industrydocuments.ucsf.edu/docs/xpxl0001

[7] Q: Did he tell you anything else on the subject of any knowledge or information as to whether Philip Morris in fact did so?

[10] A: No, sir, not in my recollection.

[11] Q: Putting this aside, now, because we have covered the communications you had with Deep Cough on the subject, did you have any other knowledge or information that Philip Morris, in connection with its reconstituted tobacco process, in fact introduced any additional nicotine into the tobacco other than such nicotine as naturally occurred in the tobacco raw materials which income to the reconstituted tobacco facility?

[21] MR. WITTEN: I object to the form of the question.

[23] THE WITNESS: If I understand the question correctly, sir, I was told, again, using the "might" phraseology, by individuals

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[1] at the American Health Foundation that that might be the case — which they knew to be the case with other companies, but could not specify at that juncture whether it was the case with respect to Philip Morris itself.

[6] BY MR. WACHTELL:

[7] Q: Had the American Health Foundation, to your knowledge, ever done any work with respect to analyzing any Philip Morris product?

[11] A: I do not know, sir.

[12] Q: You have no knowledge that they did; is that correct?

[14] A: I do not know; that is right.

[15] Q: Any other information that you had of any nature whatsoever which would indicate that Philip Morris — putting aside whether it was possible to do it in connection with the process as Mr. Silberstein described in his article, whether Philip Morris was in fact doing it?

[22] MR. WITTEN: Object to the form of that question.

[24] THE WITNESS: I was not given such information, sir.

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[1] BY MR. WACHTELL:

[2] Q: Putting aside anything you were told by Deep Cough, because I think you've told us what Deep Cough told you, or at least I hope you have, did you have knowledge or information that any other domestic tobacco manufacturer was introducing any additional nicotine in connection with its reconstituted tobacco process, other than the nicotine naturally occurring in the tobacco raw materials utilized in that process?

[12] MR. WITTEN: I object to the form of the question.

[14] THE WITNESS: Sir, I will attempt to answer.

[16] There were several parts to the question, but let me do my best, and then you can clarify, if need be.

[19] The information I was given was that the American Health Foundation, in its study of brands produced by R.J. Reynolds and Brown & Williamson, had identified the fact that — they told me they were certain that the nicotine content in the reconstituted tobacco in the five brands which I'm referring to was

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[1] significantly higher than they said it would have been had nicotine not been added to that reconstituted tobacco after the reconstituted tobacco sheet had been formed.

[5] BY MR. WACHTELL:

[6] Q: Let me ask you, other than what you learned from the American Health Foundation, did you have any other information on that subject with respect to whether any other American tobacco manufacturer was introducing extraneous nicotine in the reconstitution process not naturally found in the tobacco fragments and other raw materials utilized in that process?

[15] MR. WITTEN: I object to the form of the question.

[17] THE WITNESS: I was told that as a part of this process, sir—and please seek to clarify if you need to do so—that the nicotine content, while it remained the same in some brands of the companies I named than others, was adjusted upwards for purposes of delivery to the consumer, sir, by addition of other chemicals like ammonium carbonate.

[25] BY MR. WACHTELL:

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[1] Q: Who told you that?

[2] A: I believe I learned that from Dr. Greg Connolly.

[4] Q: When?

[5] A: This year, sir.

[6] Q: Before the airing of the program?

[8] A: After airing of the program.

[9] Q: After airing of the program?

[10] A: Yes, sir.

[11] Q: Let's go back to the period up to February 28th.

[13] Did you have any other information that any other American domestic tobacco manufacturer was adding extraneous nicotine in the course of the process of or after the manufacture of reconstituted tobacco, separate and apart from whatever nicotine was normally in the natural tobacco materials that went into the process?

[21] MR. WITTEN: Object to the form of the question.

[23] THE WITNESS: Based on my understanding of your question, I don't recall that, sir, no.

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[1] BY MR. WACHTELL:

[2] Q: You've referred to the American Health Foundation telling you of being certain of whatever they found.

[5] When was that?

[6] MS. ZIEVE: When did they find it or when were they certain?

[8] MR. WACHTELL: When did they tell him that they were supposedly certain.

[10] THE WITNESS: I was told, most recently, sir, only a few weeks ago.

[12] BY MR. WACHTELL:

[13] Q: You had a telephone conversation with Dr. Prokopczyk, is that correct, of the American Health Foundation?

[16] A: Yes, sir, as is publicly known.

[17] Q: That was on November 23rd of 1994?

[19] A: Yes, sir.

[20] Q: And he said he was certain that RJR added nicotine to its reconstituted tobacco, either alone or as a part of a solution of flavorings; is that correct?

[24] A: Yes, it is, sir.

[25] Q: Do you have any awareness of

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[1] Dr. Prokopczyk having expressed some certainty on that subject prior to February 28th of 1994?

[3] A: I was not told about certainty, no, sir.

[5] Q: Do you have any knowledge of Dr. Prokopczyk having performed any analysis of any Brown & Williamson cigarette prior to February 28th of 1994?

[9] A: Yes, sir. If the information I received is correct, then he did so.

[11] MR. WACHTELL: I'm told that the technician is at the end of the videotape.

[13] VIDEO OPERATOR: Going off the videotape record. The time now is approximately 2:32.

[16] This is the end of tape number 5.

(Recess.)

[21] VIDEO OPERATOR: Going back on the videotape record. The time now is 2:42 approximately.

[24] This is the beginning of tape number 6.

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[1] Please begin.

[3] BY MR. WACHTELL:

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[4] Q: Now, Mr. Douglas, you have told us, I believe, that you did not communicate to the people at Day One any of the discussions that you had with Deep Cough on the subject of reconstituted tobacco or indeed anything else; is that correct?

[10] A: Yes, sir. Not until they had already spoken directly.

[12] In other words, I did not communicate it to them, sir.

[14] Q: Did you communicate it to them after they had spoken directly?

[16] A: No, sir. We discussed it afterwards.

[18] Q: When did you have a discussion with the people at Day One about communications you had had with Deep Cough?

[21] A: My general recollection, sir, is that it would have started in the spring or summer of 1993, once those two parties had made direct contact and had their own thoroughgoing communications.

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[1] Q: When do you understand that the first thoroughgoing communications took place between Deep Cough and anyone at Day One?

[4] A: In general, sir, it was midway through 1993.

[6] I don't remember the month, sir.

[7] Q: What was your basis for that understanding?

[9] A: I was told that they had been in direct communications, sir.

[11] Q: And had the thoroughgoing communications gone into the matter in depth?

[13] A: To my understanding, and without firsthand awareness, that's what I was told, that they had discussed these issues.

[16] Q: Who told you this?

[17] A: I believe I was told by both parties, sir.

[19] Q: When did you understand that the taped interview took place?

[21] MS. ZIEVE: If you had an understanding.

[23] THE WITNESS: With a bit of uncertainty, sir, I believe it was this year.

[25] BY MR. WACHTELL:

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[1] Q: Well, that narrows it to January or February.

[3] Do you have an understanding as to when it was?

[5] A: No, sir. I think I may have mentioned that I haven't seen the tape or the transcript, which probably would indicate the date, sir, and I don't know.

[10] Q: So sometime between the time that you understood that there were thoroughgoing communications between Deep Cough and Day One, which you place as being midway through 1993, and a time early this year when you understood that the taped interview took place, you had communications with the people at Day One with respect to what you had learned from Deep Cough; is that correct?

[19] A: It is correct, to an extent, sir.

[21] Q: Well, why don't you tell me to what extent it is correct and to what extent it is not correct.

[24] A: It is correct, sir, to the extent that I sought not to volunteer

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[1] information to Day One, but allowed them first to discuss what they already had heard, and that's what I would respond to, sir; to discuss these issues with them.

[5] Q: Did you make any notes of that conversation with the people at Day One?

[7] A: A few times, sir, I did so, but quite honestly, I've never been one for taking many notes. I didn't even do it during law school, believe it or not.

[11] Q: No comment. Do those notes exist?

[13] A: They did at times, and I believe some are reflected in what you either have in actual documents or at least what are listed in the privilege log, sir.

[17] Q: Well, I am not aware, and maybe I'm just missing it, of any document that has been produced to us which would reflect — or which would constitute such notes.

[21] Let me show you the privilege log, and can you identify for me any item there that constitutes notes of such communication between you and ABC?

[25] A: I see none here, sir.

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[1] Q: Have such notes been produced?

[2] A: Not that I recall, sir.

[3] Q: Do such notes exist?

[4] A: No, sir.

[5] Q: What happened to them?

[6] A: The communications between myself and ABC were frequently what you might call "on the fly."

[9] They would tend to be, in my best recollection, the sort of notes that you would take on a scrap of paper to remind you to do something, and then — in other words, they were not formal notes, and I didn't maintain them because we spoke frequently and it wasn't necessary.

[16] Q: Tell me your best recollection of what you were told by the ABC people of what they had been told by Deep Cough in the thoroughgoing communications that they had had.

[20] A: My recollection is that they did discuss the tobacco reconstitution process.

[22] I recall their discussing, from what I was told, some element of this question of outside suppliers, but I do not recall specifics in that regard.

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[1] I believe they discussed the tobacco manufacturing process as a general matter.

[4] I don't recall offhand specifically what may have made up that discussion or discussions. It could have been any number of things, sir.

[8] Q: Do you recall anything else?

[9] A: Not offhand, sir, but I would like to raise it later if it comes to me.

[11] Q: I would rather get it now, if we can.

[13] Do you recall them telling you whether or not Deep Cough had said to them that to her knowledge, RJR was using extraneous nicotine purchased from outside suppliers and pouring it onto tobacco during the course of the manufacture of reconstituted tobacco?

[19] MR. WITTEN: May I have a moment, please?

[21] I have to object to the form of the question.

[23] Thank you.

[24] THE WITNESS: I recall being told, sir, without being certain at this moment

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[1] whether I was told by ABC or by Deep Cough or both, that RJR used nicotine in its manufacturing process that had been delivered to RJR from outside the plant or plants.

[5] BY MR. WACHTELL:

[6] Q: Do you recall being told in what form such nicotine was used?

[8] A: Could you clarify "form," please, sir?

[10] Q: Was it, for example, in connection with denatured alcohol?

[12] A: I don't recall being told that it was part of denatured alcohol, sir.

[14] Q: So your recollection is that it was other than denatured alcohol; is that correct?

[17] A: Yes. Yes, sir.

[18] Q: Was it in the form of flavor, or a flavor component?

[20] A: I recall being told, sir, that it was, in part, in the form of flavor — a flavor package or packet; a part of the overall substance.

[24] But also separate from that, I was told that nicotine was provided in much

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purer form to RJR, sir.

Q: Let's go one by one. You say that you were told that nicotine was present in the form of part of a flavor package; is that correct?

A: Yes, sir.

Q: Now, who told you that?

A: I don't recall for certain, sir. It was one of the two sources whom I've mentioned; that is, ABC or the individual source, sir.

Q: Were you told anything else about nicotine being present as part of a flavor package?

For example, was any particular flavor identified?

A: Not that I recall, sir.

Q: Were you told, to see whether possibly it is any assistance to you, that tobacco extract was part of a flavor package used on certain cigarettes and that there was nicotine in tobacco extract?

A: I was told that tobacco extract can—perhaps always does; I'm not certain—contain nicotine, sir.

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Q: Were you told that tobacco extract was used by RJR as one of a group of flavors in a flavor package on a certain brand or brands?

A: I don't recall being told that it was used as part of a flavor package, sir. Not in that way, no, sir.

Q: What do you recall being told, if anything, about tobacco extract being used by RJR?

A: I was told that tobacco extract was typically used — as a term, sir, was typically used as a euphemism for "nicotine."

Q: So we are clear that we are both talking about the same thing:

You are talking about tobacco extract that you were told had been delivered to RJR from outside the plant and was being used in its manufacturing processes; is that correct?

A: Yes, sir.

Q: And you understood that tobacco extract contained nicotine, and you did not understand that it was being used as one of a group of flavors in a flavor package; is that

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correct?

A: Yes. I don't recall knowing that, and I don't know it now.

Q: Do you know it, one way or the other?

A: No, I don't know whether it was used as a part of a flavor package or not.

I don't recall that distinction being made.

Not that it isn't the case; I just don't know.

Q: Did you know from either Deep Cough or what you were told by ABC that it was not being used as part of a flavor package?

A: I didn't know one way or the other, sir, if I understand your question correctly.

Q: You understood that whatever the ABC people were telling you on this subject was something that they were saying they had been told by Deep Cough about tobacco extract?

A: Not consistently, sir. I did not always know what their source of the information was, sir.

Q: You see, that's how we have

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problems, because I started this line of questions in which you were telling me of communications that you had with ABC as to what they were being told by Deep Cough, and you are now telling me that you've been interspersing in your answers matters that did not necessarily come from Deep Cough, and that is a problem.

Now, let's go back. What, if anything, were you told by ABC that Deep Cough had told them about the use of tobacco extract by RJR?

A: I was told that tobacco extract did contain nicotine.

As I said, I wasn't certain and am not certain today whether it always contains nicotine.

That "tobacco extract," as a term, was used by employees at RJR euphemistically to mean nicotine, and that the company brought in from outside suppliers nicotine in the form of a more generalized extract that contained other substances as well, and also brought nicotine into the plant in pure form.

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Q: So now what ABC told you they had learned from Deep Cough was, first, that it was brought in along with other things in a flavor package; is that correct?

A: That was one of the ways I was told, yes, sir.

Q: Did you have any idea of what proportion tobacco extract was to the totality of ingredients in this flavor package that came in from outside suppliers, as used by RJR?

MR. WITTEN: Is this a question of what ABC told him or what he knows?

MR. WACHTELL: I'm sorry. I should have specified.

BY MR. WACHTELL:

Q: In other words, there's a bunch of flavors that they are purchasing.

Did you understand from Deep Cough that they blended them together — or from ABC to Deep Cough?

A: I was told that they did blend them together at times, yes.

Q: Were you told whether ABC had learned from Deep Cough — as to when the tobacco extract, the other flavors, whatever

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was used to dissolve them, as the final totality that was being put on the tobacco, did ABC tell you whether it had learned from Deep Cough what component of the totality of the package was any nicotine that might have been in the tobacco extract?

MR. WITTEN: Object to the form of the question.

THE WITNESS: I was told that, sir.

My only uncertainty in responding—while I am specifically saying I was told that, sir—is that the information at ABC could easily have come, in part, from sources in addition to Deep Cough.

So it's important for me to draw the distinction where Deep Cough's information ended and others' began.

BY MR. WACHTELL:

Q: Now, with that qualification, what did the people at ABC tell you that they had ascertained was the percentage of nicotine to the totality of flavors, and solution and the like, that was actually used when it came time to put the flavor package on the tobacco?

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A: It was explained to me that the amount could vary considerably, depending on the product about which one was speaking, and the company doing the manufacturing, sir.

So in other words, there was not one answer.

Q: So far, we are just talking about RJR?

A: Yes, sir. This applies to RJR, sir.

Q: Now, my question is: Did they indicate to you in percentage terms, mathematical terms, quantity terms, or anything else — let me ask you in percentage terms.

Did they indicate to you, in the totality of the flavor package and whatever the flavor package was dissolved in, be it water, alcohol or the like, what percentage of that flavor package consisted of whatever nicotine might have been in the flavor ingredient tobacco extract?

A: I was not told precise percentages, sir.

I was —

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[1] Q: Do you remember being told any percentage?

[3] A: No. I was told in other ways, without having been told specifically the number — the numeral percentage.

[6] Q: Tell me your best recollection what the people at Day One told you their understanding was as to how much nicotine from the flavor tobacco extract was to the totality of all of the flavors in the solution, et cetera, et cetera, et cetera.

[12] MR. WITTEN: Could I persuade you to put a date on the question?

[14] MR. WACHTELL: I'm going to find that out. One at a time.

[16] MR. WITTEN: The question is so open-ended that we don't know.

[18] MR. WACHTELL: All these questions have been after he understood that they had thoroughgoing inquiries of Deep Cough and before the taped interview.

[22] MS. ZIEVE: Do you have the question right?

[24] THE WITNESS: I believe so, and if I get it wrong, please feel free to clarify

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[1] for me.

[2] I was told two things that I recall now.

[4] That is, first, that it was not clear, as far as what I was told, what percentage of the final product's contents the nicotine in the tobacco extract made up.

[8] I was told, in addition, that based on feedback on this subject from nicotine addiction experts, that the quantity in the tobacco extract was, at least in some cases, substantial enough to cause or sustain addiction.

[14] Q: So you were told by the people at ABC, as I understand, that addiction experts had told them that the quantity of nicotine in the tobacco extract was substantial enough to cause or sustain addiction; is that correct?

[19] A: That is my recollection, sir, yes.

[21] Q: But that they did not know what the proportion of nicotine was that ended up in the overall quantity of flavors in the solution and dilute that was actually used on the tobacco; is that correct?

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[1] A: I do not know if they knew, sir. I do not recall their telling me, sir.

[4] Q: They did not tell you that anybody had told them that the amount of nicotine in the total flavor and dilute solution package that was added to the nicotine was sufficient to sustain — or whatever else you said about addiction; is that correct?

[10] MR. WITTEN: Object to the form of the question.

[12] THE WITNESS: I'm sorry. I really did lose the first part of the question. If you could repeat it?

[15] BY MR. WACHTELL:

[16] Q: They did not tell you that any expert had told them that the amount of nicotine in the dilute solution that was actually used on the tobacco was sufficient to cause or sustain addiction; is that correct?

[21] MR. WITTEN: Object to the form of the question. Assumes a fact.

[23] THE WITNESS: I'm sorry. I'm not familiar with the term "dilute solution," sir.

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[1] BY MR. WACHTELL:

[2] Q: We have been talking about, you have tobacco extract, you have all the other flavors in the flavor package, and then it's all either put in water or alcohol and diluted so it can be added to the tobacco. That's what we've been talking about.

[8] That's what your understanding is of what happens, isn't it?

[10] A: Sir, in the most superficial way that sounds familiar, but I'm not familiar with that process, sir.

[13] Q: But in the most superficial way, that's what you understood was happening; is that correct?

[16] A: Very superficially, sir, yes.

[17] Q: Very superficially or not, did anybody at ABC tell you that any expert had told them that the amount of nicotine that ended up in that overall solution that was actually used on the tobacco was significant enough to cause or sustain addiction?

[23] A: I don't recall being told that one way or the other, sir.

[25] Q: Now, were you told by ABC,

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[1] recounting anything that had been told to you by Deep Cough, that tobacco extract, as one of a number of flavor package ingredients, was used on all brands or some brands of RJR?

[5] A: I was told it was used on some brands, sir. I don't recall whether it extended to all brands. I do not know.

[8] Q: You have also told us that the people at ABC recounted to you that Deep Cough told them that nicotine was coming into the plant and being delivered to RJR from outside suppliers in pure form, separate and apart as part of a flavor package containing flavor X; is that correct?

[15] A: That is my recollection, sir.

[16] Q: Just what did they tell you on this score, as to what they knew about nicotine coming into the plant; from where, at what point in the process, if any, it was being utilized, et cetera, et cetera?

[21] A: I was told that RJR purchased nicotine that was substantially pure.

[23] I don't recall specifically, sir; 50 percent or more sounds right to me, but, again, that's not with certainty that I

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[1] say that, and that the nicotine was stored in the plant, where it awaited use and application in the manufacturing process.

[4] I do not know at what point in the specific manufacturing process of these numerous brands produced by the company that it was used.

[8] Q: You were told that this was something that Deep Cough had told the people at ABC; is that correct?

[11] A: I believe so, sir.

[12] Q: Who told you this from ABC?

[13] A: That information could have come from either of the two; producer or associate producer, sir.

[16] Q: Bogdanich or Summa; is that correct?

[18] A: That's to the best of my recollection, sir.

[20] Q: But it would not be anybody else who you think told you this?

[22] A: Not that I'm aware of, sir.

[23] Q: Was there any indication as to at what point in its manufacturing process ABC had been told by Deep Cough RJR would introduce

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[1] such substantially pure, 50 percent nicotine to the tobacco?

[3] A: I don't know, sir.

[4] Q: I don't know that you answered. Were you told that?

[6] A: I don't recall being told that, sir.

[8] Q: So you don't recall anybody at ABC telling you that they had learned anything from Deep Cough as to at what stage of the manufacturing process RJR supposedly was using such 50 percent pure nicotine; is that correct?

[13] MS. ZIEVE: Asked and answered.

[14] THE WITNESS: I don't recall, sir.

[16] BY MR. WACHTELL:

[17] Q: You don't recall being told that or —

[19] A: That is correct, sir.

[20] Q: You may have been told it?

[21] A: Yes, I may have been. I don't recall being told that, sir.

[24] Q: Did anyone say to you it had anything to do with the reconstituted tobacco

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[1] process?

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[2] MS. ZIEVE: What's "it" in your question?

[4] MR. WACHTELL: The supposed use of 50 percent pure nicotine purchased from outside suppliers.

[7] THE WITNESS: The 50 percent figure, of course, sir, as I said earlier, is a general and vague recollection, which may or may not be correct.

[11] But I do not recall, in answer to this specific question, being told such.

[13] BY MR. WACHTELL:

[14] Q: So the specific question being whether you had been told it was used in connection with the reconstituted tobacco process; is that correct?

[18] A: Yes, sir.

[19] Q: Do you recall any other things that Summa or Bogdanich told you that they had been told by Deep Cough?

[22] A: Not offhand, sir.

[23] Q: Putting aside any information that came to you from Deep Cough, did you convey to any of the people at Day One, prior

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[1] to February 28th of 1994, whatever you knew and did not know about the question of reconstituted tobacco and whether nicotine was or was not added to it?

[5] MR. WITTEN: I object to the form of that question.

[7] THE WITNESS: I believe I did share information with Day One regarding the reconstitution of tobacco. That was information which I did not receive from Deep Cough.

[12] BY MR. WACHTELL:

[13] Q: Yes. But I've taken down in previous answers all the things you told me you knew about it and did not know; it was possible it could be used, you had no knowledge it was necessarily being used, and the like.

[18] What I'm trying to find out is did you, in the first place, tell the people at ABC the full extent of any knowledge or information you had on the subject?

[22] A: I expect that I did, sir.

[23] Q: Would it be fair to say that you did not tell them more than whatever you knew or had information on the subject?

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[1] A: Of course not, sir.

[2] Q: To your knowledge or information, were the people at Day One aware of the fact that Deep Cough was in communication with the people at the FDA?

[6] A: I don't know, sir. I don't recall that they were aware of that, sir.

[9] I will say right up front, I'm not certain, though.

[11] Q: Exhibit 113; you sent this letter by Elisabeth J. Ray to Mr. Summa; is that correct?

[14] A: Yes, sir, it is.

[15] Q: You say here:

[16] "Part of what caught my eye is her comment about 'cigarette factories suddenly disappearing.'"

[19] Do you see that?

[20] A: Yes, sir.

[21] Q: Then you say:

[22] "Since in a real sense that is what we would see happen if the industry's deliberate manipulations were 'outed' and the permitting of nicotine in cigarettes

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[1] prohibited."

[2] Did you write that?

[3] A: Yes, sir.

[4] Q: Did you believe that when you wrote it?

[6] A: Yes, sir. Will you allow me to expand on it?

[9] Q: Can I ask my questions first?

[10] A: You certainly may. Thank you.

[11] Q: Did you believe that if the use of nicotine in cigarettes were prohibited, in a real sense, cigarette factories would disappear?

[15] A: Yes, sir, as we know them.

[16] Q: At the end of your fax to Mr. Summa of September 15th, 1993, it says:

[18] "Hope your trip tomorrow bears fruit. It was good talking to you."

[20] What were you referring to?

[21] A: I don't know, sir, other than that they were obviously going to be on a trip involving the investigation, sir.

[24] Q: You have no recollection, as you sit here now, of what that trip entailed?

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[1] A: No, sir. They took numerous trips, sir. I don't know which one this refers to.

[4] Q: You have referred to the American Health Foundation and certain testing that they did; is that correct?

[7] A: Yes, sir.

[8] Q: What testing were you referring to?

[10] A: My understanding, sir, is that the American Health Foundation conducted testing on the reconstituted tobacco portion of several brands of cigarettes in which it identified the quantities of nicotine on the reconstituted tobacco in those brands, sir.

[16] Q: Is this something that your colleagues at ABC discussed with you?

[18] A: We did discuss that, yes, sir.

[19] Q: Was your advice or input asked for or sought on this subject?

[21] A: If I recall correctly, sir, we discussed what brands might be worth examining as part of such a study, sir.

[24] Q: Was the form of the test that was going to be conducted discussed with you?

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[1] A: If I understand your question correctly, sir, no, not at the scientific level; only that it would be done.

[4] Q: Did you understand what the test was going to be before it was conducted?

[6] A: I don't recall, sir, if I knew it was going to be conducted before it was. So the answer is probably not.

[9] Q: You are saying that the discussion with you as to what brands should be used took place after the testing was conducted?

[13] A: Or during, sir.

[14] Q: But you did understand that the test entailed taking the reconstituted tobacco portion from certain brands of cigarettes and identifying the quantities of nicotine in such reconstituted tobacco; is that correct?

[19] A: Yes, sir.

[20] Q: Did you understand that that quantity of nicotine was going to be compared with something?

[23] A: I came to understand after the tests were completed, sir—and I say that because I'm not sure I knew that

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[1] beforehand—that the quantity of nicotine identified in these brands was compared to the quantity of nicotine that the scientists would have expected to have been there had nicotine not been added, sir.

[6] There was that comparison made, yes.

[8] Q: When you say that this may have been after the tests were conducted, was this before the program was aired?

[11] A: Yes, sir.

[12] Q: Did you have any understanding as to what data was being used as to what the scientists would have expected to have been there had nicotine not been added, as you say?

[16] A: I think I understand your question, and no, I'm not aware of the specific data they used, sir.

[19] Q: Well, did your colleagues at ABC tell you that the comparison was being made with some percentage found in the literature of the amount of nicotine in reconstituted tobacco as it came out of a reconstituted tobacco plant?

[25] A: No, sir.

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We didn't discuss that aspect, as I said.

Q: So you didn't know whether they were comparing apples with apples or apples with oranges; is that correct?

MR. WITTEN: Object to the form of the question.

THE WITNESS: My understanding, sir, is they were comparing reconstituted tobacco with reconstituted tobacco, sir.

BY MR. WACHTELL:

Q: They were comparing reconstituted tobacco pulled out of a finished cigarette — is that correct?

A: Yes, sir.

Q: — with you knew not what; is that correct?

A: With other reconstituted tobacco, sir, that had not been manipulated after the sheet had been produced.

That was my understanding, sir.

Q: Was it your understanding that they were comparing it with other reconstituted tobacco that had been taken out of any cigarette?

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A: I do not know, sir.

Q: It doesn't refresh your recollection that they were comparing it with reconstituted tobacco taken from tobacco at the end of the reconstituted tobacco plant process?

A: No, I did not know that, sir, and do not know that today.

Q: And before they manufacture the actual cigarette?

A: I don't know, sir.

(Deposition Exhibit 118 referenced.)

MR. WACHTELL: I'm going to mark as Exhibit 118 these materials; the first, a cover sheet, which is a letter from Congressman Meehan to Honorable Janet Reno and the like. It's a Prosecution Memorandum.

BY MR. WACHTELL:

Q: Are you familiar with this document?

A: Yes, sir.

Q: Did you write certain portions of this Prosecution Memorandum?

A: Yes, sir, I assisted in the

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preparation of this, sir.

Q: Let me direct your attention to what is page 36 of this "Prosecution Memorandum," is that correct?

Do you see it?

A: Yes, I have page 36, sir.

Q: Is this a memorandum where Congress Meehan, a Congressman of the United States, is asking the Attorney General of the United States to seriously investigate and then prosecute certain individuals for perjury based on the materials in this memorandum; is that correct?

A: No, sir.

Q: Oh, what is your understanding what this "Prosecution Memorandum" consists of?

A: This memorandum and the cover letter specifically ask the Attorney General to open a formal investigation, sir, but not to prosecute.

Q: So the document referred to as a Prosecution Memorandum was not intended to ask anybody to prosecute?

Is that your testimony?

A: Yes. It doesn't do so, sir.

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Q: It's just called a Prosecution Memorandum?

A: The Criminal Division at the Department of Justice has, I believe Congressman Meehan has said publicly, asked them him to prepare what they called a Prosecution Memorandum.

It was understood throughout that it was a term of art, sir.

Q: You understood that it is a very serious business to ask the Department of Justice to investigate somebody for criminal violations; is that correct?

A: Yes, it is, sir.

Q: So you knew that whatever portions of this you were drafting, it was serious business; is that correct?

MS. ZIEVE: Can you answer the question?

THE WITNESS: Yes, it is serious business, sir.

BY MR. WACHTELL:

Q: At page 36 of this memorandum there is a section which, in the first place, purports to reflect what the American Health

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Foundation had done for ABC Day One — that is, ABC News Day One.

Is that correct?

MS. ZIEVE: Which portion are you referring to?

MR. WACHTELL: The first full paragraph on the page. Takes up about half the page.

THE WITNESS: This refers to the investigation — or probably best put, the research that was done by the American Health Foundation at the request of Day One, yes, sir.

BY MR. WACHTELL:

Q: Then the next paragraph is, as you've testified earlier today, a telephone conversation that you had with Dr. Prokopczyk of the American Health Foundation; is that correct?

A: Yes, sir.

Q: You say in this portion of this Prosecution Memorandum:

"Dr. Prokopczyk confirmed in a telephone conversation on November 23, 1994 that RJR added nicotine to its reconstituted tobacco. Dr. Prokopczyk said he was

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certain" — and you underscored the word "certain," is that correct?

MS. ZIEVE: I object to the form of the question and to your assuming a fact that it is not in evidence.

You keep saying that, "Cliff, you underscored that word," or "You say in this portion of this Prosecution Memorandum."

This document came from the Congressman and not from Cliff.

MR. WACHTELL: Maybe I omitted to ask him. I thought I asked him if he drafted this portion.

BY MR. WACHTELL:

Q: Did you draft this portion of the Prosecution Memorandum?

MS. ZIEVE: I'm going to have to object here too.

I don't think Cliff can respond to questions about which portions of this memorandum he was involved in drafting without the presence of House counsel.

MR. WACHTELL: If you thought you needed House counsel here, why don't you have him here?

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MS. ZIEVE: It's not that I thought House counsel needed to be here. We were asked yesterday — as I told you yesterday, if anything came up, we were asked to assert their interests and tell you that if you have a problem, we can — I suppose I could try to call, or we can reconvene when they can be here.

MR. WACHTELL: I will ask my questions. If the witnesses refuses to answer, let him refuse.

BY MR. WACHTELL:

Q: Did you draft these two paragraphs of the Prosecution Memorandum?

MS. ZIEVE: I'm going to instruct the witness not to answer based on my instruction from House counsel.

(Instruction Not to Answer.)

BY MR. WACHTELL:

Q: I'm going to read these two sentences.

"Dr. Prokopczyk confirmed in a telephone conversation on November 23, 1994

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that RJR added nicotine to its reconstituted tobacco.

"Dr. Prokopczyk said he was certain," the word is underscored, "that this nicotine was added either alone or as a part of a solution of flavorings."

Now, we have established it was you who had this telephone conversation referred to in this memorandum; is that correct?

A: Yes, sir, I did have that conversation.

Q: Now, in that telephone conversation, did you make any inquiry of Dr. Prokopczyk as to the methodology of his testing?

A: Yes. In laymen's terms, he attempted to explain to me what he was doing.

Q: Did he tell you what he had compared the reconstituted tobacco that he had taken out of the cigarettes with?

A: He told me that he compared it to reconstituted tobacco, which he has had some years of experience in analyzing, sir, and I don't know the specific nature of the

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reconstituted tobacco.

Q: You didn't ask?

A: We discussed it fully, sir.

Q: Did you ask what it was that he compared the percentages he found in the reconstituted tobacco that he took out of the RJR cigarettes with?

A: Yes, sir.

Q: What did he tell you?

A: He told me that he compared it to tobacco which had not yet been modified by the addition of other substances to it, sir.

Q: You are aware that on the taped interview of Dr. Prokopczyk, he said:

"You know, there are several explanations" —

MS. ZIEVE: Objection as to form.

BY MR. WACHTELL:

Q: — "as to why the percentage of nicotine he was finding in the reconstituted tobacco that he was pulling out of an RJR cigarette was higher than he expected to find from some prior data."

MS. ZIEVE: Same objection.

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THE WITNESS: Are you asking me if I know that, sir?

BY MR. WACHTELL:

Q: Yes.

A: Yes. I believe it's reflected in the preceding paragraph, sir.

Q: Did you ask Dr. Prokopczyk in your telephone conversation what the other explanation or explanations would be for him finding a higher percentage in what he pulled out of the cigarette than whatever data he was comparing it with?

A: Yes, sir, I believe that's reflected here also, sir.

Q: What did he tell you?

A: He said that the nicotine was added, in his opinion, either alone or as part of a solution of other substances along with the nicotine, sir.

Q: That's what he said on the program, that that was one of the possible explanations.

A: Those are two explanations, sir.

Q: Did you ask Dr. Prokopczyk whether there was any other explanation for the

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test results he said he had arrived at — or found?

MR. WITTEN: Are you now asking about test results that were discussed on the ABC segment?

MR. WACHTELL: I'm going to clarify that, Roger.

BY MR. WACHTELL:

Q: Do you have any understanding that Dr. Prokopczyk, subsequent to February 28 of 1994 and prior to the telephone conversation that you had with him on November 23rd of 1994, had done any additional testing of reconstituted tobacco?

A: I do not know, sir.

Q: And you had no reason to understand that he had; is that correct?

A: That is correct, sir.

Q: When you were speaking to him on November 23rd, insofar as you knew, the only information he had on the subject was that which he had derived from the work that he did for ABC prior to February 28th of 1994; is that correct?

A: That is what I inquired about

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and that's all I was aware of, sir.

Q: Now, he told ABC on his taped interview that there were several explanations as to why the percentage of nicotine that he found was higher than he would have anticipated.

Did you ask him what those explanations were?

A: I believe I did, sir, and what Dr. Prokopczyk said to me is that he had an opportunity to review this information further since then and to consider his findings, and it was at that point, sir, that he confirmed for me his "certainty," which is underscored here, that nicotine had been added, sir.

Q: Did you ask him what the other explanations were?

A: If I did, sir, I don't recall, and I don't recall his telling me what the other explanations were, because of his certainty that nicotine had been added here.

Q: So you don't recall him telling you in your telephone conversation of November 23rd — either your asking him or his telling you, what the other explanations might

Page 554

be for the test data that he had derived; is that correct?

A: He told me that these were the only two explanations, sir.

It was quite explicit.

Q: Both of them adding up to nicotine being added; is that correct?

A: Yes, indeed, sir.

Q: He did not tell you and you did not ask what other explanation might explain what he found?

MR. WITTEN: Object to the form of the question.

BY MR. WACHTELL:

Q: Is that correct?

MS. ZIEVE: Asked and answered.

THE WITNESS: Sir, I did ask him to tell me how it could have happened, and we talked about it to be sure that I understood correctly, and he told me that there were two ways that it could have been done, both involving nicotine being added, yes, sir.

BY MR. WACHTELL:

Q: In your conversation with him, did you cite him back to his taped interview

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where he said "You know, there are several explanations"?

A: Yes, I did, sir.

Q: You specifically cited him back to that language in his taped interview; is that correct?

A: I cited back to the interview, sir. I don't recall if I cited the specific language.

Q: That was my question. So you are now saying that you do not recall citing him to the specific language; is that correct?

MS. ZIEVE: Objection. You are mischaracterizing the prior question and testimony.

THE WITNESS: Could we repeat the prior question and answer, please?

MR. WACHTELL: Yes, we certainly can.

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[21] BY MR. WACHTELL:

[22] Q: The prior question was:

[23] "In your conversation with him did you cite him back to his taped interview where he said, 'You know, there are several

Page 556

[1] explanations,'" and your answer was, "Yes, I, did, sir."

[3] Now you are saying that you do not recollect citing him to that language; is that correct?

[6] MS. ZIEVE: Objection. You are mischaracterizing his testimony.

[8] THE WITNESS: I did respond to your question, sir, that I did refer back to the taped interview.

[11] BY MR. WACHTELL:

[12] Q: You didn't refer back to that portion of it that was in my question.

[14] Is that the way you answer questions all the time, Mr. Douglas?

[16] MS. ZIEVE: I object. You are being argumentative again. Your second question had to do with specific language, your first didn't.

[20] MR. WACHTELL: My first question had to do with specific language, Counsel.

[22] This witness has his own arcane way of choosing to interpret questions which leads to answers which, if not followed up on, are categorically false.

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[1] MS. ZIEVE: You are a piece of work.

[3] Can we keep going?

[4] MR. WACHTELL: Is that a compliment?

[6] MR. VLADECK: No.

[7] BY MR. WACHTELL:

[8] Q: Did you ever discuss with anyone whether there was anything that happened in the normal process of manufacturing cigarettes, after the reconstituted tobacco left the reconstituted tobacco plant and before the final cigarette emerged from the cigarette manufacturing plant, that would account for what Dr. Prokopczyk found that had nothing to do with any addition of nicotine?

[17] MS. ZIEVE: Object as to form.

[18] MR. WITTEN: I beg you a moment to read the question. I lost it.

[20] THE WITNESS: I might need to also.

[22] BY MR. WACHTELL:

[23] Q: May I have an answer, please?

[24] A: I don't understand the question, sir.

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[1] MR. WACHTELL: Would the reporter read back the question, please?

(Record read.)

[6] THE WITNESS: I mean this with all due flattery, sir: Do you read Henry James?

[9] MR. WACHTELL: No. I find him very obscure, so I try not to.

[11] THE WITNESS: Could you rephrase the question, please?

[13] MR. WITTEN: Herb thinks Henry James is a piece of work.

[15] THE WITNESS: I'm sorry, sir. I really didn't understand the question.

[17] BY MR. WACHTELL:

[18] Q: I will represent to you that from my recollection, subject to correction if I am wrong, that the comparison data that Dr. Prokopczyk used was some historical data on the percentage of nicotine found in reconstituted tobacco coming out of a reconstituted tobacco plant, and that it was something on the order of magnitude of 25

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[1] percent of the amount of nicotine that he said would be found in tobacco leaf, and that he then said when he pulled reconstituted tobacco out of a finished cigarette, he found something more on the order of magnitude of 75 percent of the nicotine that would be found in tobacco leaf.

[8] My question of you is whether you ever discussed with anyone whether something in the manufacturing process, having nothing to do with the addition of nicotine, could account for that different data.

[13] MR. WITTEN: I object to the form of the question.

[15] THE WITNESS: I discussed it with Dr. Prokopczyk, sir.

[17] BY MR. WACHTELL:

[18] Q: You did?

[19] A: Yes, sir.

[20] Q: In your telephone conversation in November?

[22] A: Yes, sir.

[23] Q: What did you say to him and what did he say to you as to the potentiality that something that occurred in the process of

Page 560

[1] manufacturing cigarettes, having nothing to do with any addition of nicotine, that could account for the fact that there was different data at the end of the cigarette manufacturing process than at the beginning of the cigarette manufacturing process?

[7] MR. WITTEN: Object to the form.

[8] BY MR. WACHTELL:

[9] Q: Would you answer?

[10] A: Based on his understanding as an expert in this area, which includes, I think relevantly, the American Health Foundation's work for the tobacco companies, he told me that he was not aware of any other reason for the increase in the nicotine levels other than the adding of nicotine, either alone or as a part of a solution.

[18] Q: That's what he told you in November; is that correct?

[20] A: Yes, sir.

[21] Q: Did you have any discussion with him about any question of migration of nicotine from tobacco leaf to reconstituted tobacco during the course of the cigarette manufacturing process?

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[1] A: Not on November 23rd, no, sir.

[2] Q: At any time?

[3] A: Not with Dr. Prokopczyk, no, sir, but with others.

[5] Q: Who did you have a discussion about migration with?

[7] A: I have discussed that with Dr. Michael Cummings and Dr. John Pauly and with ABC.

[10] Q: Did the people at ABC tell you that they had been told by representatives of Philip Morris—after the program, now—that Dr. Prokopczyk's conclusions were invalid, because what actually accounted for the difference in his data was migration from tobacco leaf to reconstituted tobacco during the course of the cigarette manufacturing process?

[19] MR. WITTEN: When was that representation made by Philip Morris to ABC?

[21] MR. WACHTELL: I said after the program.

[23] MR. WITTEN: When?

[24] MR. WACHTELL: I don't know. In the first place, it's in our interrogatory

Page 562

[1] answers.

[2] In the second place, I informally told it to you and your partner.

[4] BY MR. WACHTELL:

[5] Q: I'm simply asking you: Did the ABC people, subsequent to the program, ever discuss with you the question of whether the result that Dr. Prokopczyk found was simply caused by migration of nicotine from leaf tobacco to reconstituted tobacco during the course of the process of manufacturing cigarettes?

[13] MS. ZIEVE: That's a different question, now.

[15] MR. WACHTELL: Well, let me ask that question.

[17] MS. ZIEVE: Okay.

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[18] THE WITNESS: No, sir. And my opinion is that the suggestion is absurd.

[20] BY MR. WACHTELL:

[21] Q: That's your scientific opinion?

[22] A: It's my opinion based on the fact, sir, that the American Health Foundation, to my knowledge, didn't study Philip Morris cigarettes.

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[1] Q: So nothing, as you understand, in the lab work done by the American Health Foundation in any way lends support to whether Philip Morris did or did not add nicotine to its cigarettes; is that correct?

[6] A: I wouldn't know, sir. I don't know.

[8] Q: Well, you say that your understanding was they didn't study Philip Morris cigarettes.

[11] A: In this study, that is correct. I'm not aware of their having studied Philip Morris cigarettes.

[14] Q: You are not aware of them having studied it in connection with any study that they did for ABC or that was furnished to ABC; is that correct?

[18] A: No, that is correct; they did not, no.

[20] Q: Now, can you answer my question, which I don't think was limited to Philip Morris? My question was:

[23] At any time have the people at ABC discussed with you that an explanation for Dr. Prokopczyk's data, where he found the

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[1] higher nicotine in the reconstituted tobacco in the finished cigarette than in the reconstituted tobacco before the cigarette was manufactured, could result from the migration of nicotine from the leaf tobacco to the reconstituted tobacco during the course of the cigarette manufacturing process?

[8] MR. WITTEN: I have to object to that question on the ground that, as I understand it, it's way beyond the scope of proper discovery.

[12] I don't see how it could be relevant to the determination of the issues in this lawsuit whether ABC, after the lawsuit was filed, learned something from Philip Morris's counsel and then communicated it to this witness.

[18] Perhaps it's relevant to whatever the witness is doing or had done on Capitol Hill and to whatever the Attorney General does about this, but I don't think it is relevant to this lawsuit.

[23] MR. WACHTELL: Well, suppose, for example, Roger, the people at ABC told him, "We are in big trouble because we screwed up

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[1] because there was a very logical explanation for what Prokopczyk found and we never thought to ask the question."

[4] MR. WITTEN: Your question was did ABC ever say that Philip Morris said that?

[6] MR. WACHTELL: No, I'm not asking that at all.

[8] I'm simply asking him whether he ever had any discussion subsequent to the program with ABC on the subject of whether an explanation for Prokopczyk's data was the potentiality of migration during the cigarette manufacturing process.

[14] MR. WITTEN: I didn't understand that was the way you were asking it.

[16] But if you are asking did ABC confess an error after the broadcast, sure, that's relevant.

[19] MR. WACHTELL: I'm just asking to get an answer whether there was or was not a conversation on that subject.

[22] It's taken me twenty minutes now to get a simple answer to that question.

[24] THE WITNESS: I'm aware of no such communications, sir.

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[1] BY MR. WACHTELL:

[2] Q: Are you personally familiar with the cigarette manufacturing process at the cigarette manufacturing plant?

[5] A: At a layperson's level, perhaps I am, sir.

[7] Q: In connection with your work on the Prosecution Memorandum, Exhibit 118, did you have any consultation with anybody at ABC or any representative of ABC?

[11] MS. ZIEVE: Could you explain the relevance of the question?

[13] MR. WACHTELL: Sure. I would like to know whether ABC in any way sought to use their collaborator, Mr. Douglas, to color what went into a Prosecution Memorandum so as to get an after-the-fact justification for the libel that they perpetrated against my client.

[20] MR. WITTEN: You asked him for his explanation, so that's it, and I'm not going to object to it.

[23] MR. WACHTELL: I don't know whether this happened or not, but I want to find out.

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[1] MS. ZIEVE: You can answer it.

[2] THE WITNESS: No, sir.

[3] BY MR. WACHTELL:

[4] Q: So at no time when you were working on this Prosecution Memorandum or working for Congressman Meehan did you have any communication with anybody from ABC, either layperson or attorney; is that correct?

[9] MR. WITTEN: That's a different question.

[11] That one wasn't limited as to subject matter.

[13] MR. WACHTELL: Let me ask the broader question first.

[15] BY MR. WACHTELL:

[16] Q: At any time during the course of your employment by Congressman Meehan, did you have any communication on any subject with anybody either at ABC or representing ABC?

[20] A: Yes, sir.

[21] Q: What were those communications?

[22] A: I received calls periodically from a — I believe it is a producer, Jane Bruns, as well as reporters and producers from literally dozens of broadcast and print

Page 568

[1] outlets, sir, over the months that I was preparing with Congressman Meehan and his staff this Prosecution Memo, sir.

[4] Q: Did you discuss with them the work you were doing in connection with the preparation of that Prosecution Memorandum?

[7] MR. WITTEN: "Them" being any media representative?

[9] MR. WACHTELL: Any ABC person or ABC representative.

[11] MR. WITTEN: Because that wasn't his answer.

[13] MR. WACHTELL: I think it was. He identified for me at least one person at ABC, and then he testified there were others at other places as well.

[17] MR. WITTEN: Okay. But "one" doesn't make "them," and "them" sounded like it was referring to everybody he had mentioned.

[21] THE WITNESS: I understand, sir.

[22] BY MR. WACHTELL:

[23] Q: Did you have a communication with more than one person at ABC during this period? Or representing ABC?

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[1] A: During the period that I have been on Capitol Hill, I do not recall other communications.

[4] I'm not going to exclude the possibility that I may have taken a call on occasion from people who are affiliated with ABC, sir; I just don't know.

[8] Q: Now, in the communication with this ABC producer that you identified, did you discuss what was going into your draft report?

[11] A: I discussed with the ABC producer this issue on exactly the same terms that we, our office, discussed it

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with all members of the press, sir, and that was to confirm the fact that Congressman Meehan, as he had stated months ago, was pursuing preparation of this memorandum and that it would address issues of federal criminal statutes and their possible violation by tobacco companies or their representatives, sir, and that it would be produced shortly — until the announcement, which you have a copy of, stated specifically when it would be released sir.

[24] **Q:** Now, other than this one ABC producer, Jane — and I didn't get her last

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[1] name.

[2] **A:** Bruns, B-r-u-n-s, sir.

[3] **Q:** Jane Bruns. Did you, during that period of time, have any communication on any subject with anybody else at ABC or any person representing ABC?

[8] **MS. ZIEVE:** Object to the question. It's over-broad.

[10] **BY MR. WACHTELL:**

[11] **Q:** Other than as testified to yesterday.

[13] **A:** I don't recall what the testimony regarded yesterday, sir.

[15] If I may have my recollection refreshed?

[17] **MR. WITTEN:** You testified, as I recall, to two conversations with my colleague, Steve Cherry.

[20] I assume you are not interested in going over those?

[22] **MR. WACHTELL:** No, I'm not. That's why I excluded it from my question.

[24] **THE WITNESS:** I see. No, sir, not in my recollection,

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[1] as I've said.

[2] **BY MR. WACHTELL:**

[3] **Q:** You had no communication with any of the Day One people during that period of time?

[6] **A:** Yes, sir. It's been quite deliberate.

[8] **Q:** You did not send anybody any draft of any section of Exhibit 118 — anybody at ABC?

[11] **A:** Absolutely not.

[12] **Q:** You did not read anybody any portion of any draft; is that correct?

[14] **A:** No, sir, not at all.

[15] **Q:** You did not discuss any portion of such draft with them; is that correct?

[17] **A:** It is correct.

[18] **Q:** And that is either people at Day One or any counsel, inside or outside, representing ABC; is that correct?

[21] **A:** That is correct.

[22] **Q:** Have you at any point had any conversation either with people at Day One or any counsel in or outside ABC, but representing ABC, subsequent to the commencement of this

Page 572

[1] lawsuit as to any theories or approach that they are planning to take in defending this suit?

[4] **A:** No, sir.

[5] **Q:** Mr. Douglas, my colleague tells me that you gave an answer in which you indicated that you had conversations with ABC concerning migration of nicotine at some point.

[9] I did not pick up on your answer, so let me do so now.

[11] Would you tell me what you were referring to?

[13] **A:** If I'm not mistaken, sir, I recall discussing with ABC the information, at least generally, that I had been given by Dr. Cummings, whom I mentioned earlier, who either himself or in the case of his colleague, Dr. Pauly, had identified migration of nicotine, sir.

[20] **Q:** When was this discussion that you had with ABC?

[22] **A:** My best recollection is that it was at the end of 1993 or early in 1994, sir.

[24] **Q:** But in any event, prior to the airing of the program?

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[1] **A:** Yes, sir.

[2] **Q:** What was it that you told them about migration, as you understood it from either Dr. Cummings or Dr. Pauly?

[5] **A:** My recollection, if I'm not mistaken, is that I merely told them that there was migration of nicotine; that either Dr. Cummings, or perhaps Dr. Slade, had said to me that the Fresh Wrap creation by R.J. Reynolds was intended actually to keep nicotine from migrating, or keep it from falling off, as I was told — off of the tobacco.

[13] That was about the extent of it, because I believe that's the extent of my knowledge.

[16] It's my belief that there was communication, either before that time or certainly thereafter, between ABC's Day One and Dr. Cummings, and perhaps with Dr. Pauly.

[20] **Q:** Did you have any knowledge with respect to any aspect of the migration of nicotine other than that which you just have testified to that you recounted to the people at ABC?

[25] **A:** No. Not that I recall, sir, no.

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[1] **Q:** Did you ever have any discussion with Dr. Slade about the existence of a Lorillard patent having to do with the migration of nicotine?

[5] **A:** No, I do not recall that.

[6] **Q:** Did you have any awareness of any such existence of such Lorillard patent?

[8] **A:** I don't believe so.

[9] **Q:** Now, a point in time came when you were formally interviewed by the Day One people; is that correct?

[12] **A:** Yes, sir.

[13] **Q:** Do you recall the date?

[14] **A:** No, I don't, sir.

[15] **Q:** Would January 27 of 1993 refresh your recollection, at or about that date?

[17] **A:** That was the likely date, sir, yes.

[19] **Q:** Where did this take place?

[20] **A:** It took place at the offices of the American Cancer Society, sir.

[22] **Q:** Prior to that formal taping session, did you have an informal meeting or meetings with Mr. Bogdanich, Mr. Summa, or either of them with respect to what would be

Page 575

[1] gone over in your taped interview?

[2] **A:** No, sir. They actually were very explicit in saying they could not do that.

[5] **Q:** Did you meet with them up front or within a day or two, or whatever, of being taped?

[8] **A:** I don't recall doing so, no, sir.

[10] **Q:** Did you have dinner with them the previous evening?

[12] **A:** I don't recall doing so, sir, though we had dinner on a few occasions, or lunch, as the case may be.

[15] I don't recall having dinner the night before. I'm not certain.

[17] **Q:** Well, according to an expense account of, I guess, Mr. Bogdanich — I'm reading:

[20] "January 26, dinner with Cliff Douglas, Keith Summa, pre-interview for tomorrow shoot. City Cafe at 22nd and M Street in Washington.

[24] "Douglas is official with American Cancer Society. American Express card

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[1] not accepted. Paid cash. $143.99."

[2] Do you recall now having such a dinner at the City Cafe in Washington, D.C. the night before your taped interview with Mr. Bogdanich and Mr. Summa?

[6] **A:** Yes, sir. That sounds familiar.

[7] **Q:** That's refreshed your recollection?

[9] **A:** Yes, it has. Thank you.

[10] **Q:** It was indeed a pre-interview for the taped interview, as Mr. Bogdanich describes it?

[13] **A:** I don't understand that phrase, sir. I didn't write it.

[15] It was prior to my interview, yes.

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[17] Q: Was there a discussion of the subject matters that would be covered in your interview?

[20] A: No, sir. Actually, what we discussed, as I recall, was the fact that they were doing a series of interviews, sir, and "pre-interview"—and I can only conjecture—would not necessarily have referred to my interview, but with other interviews;

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[1] with Congressman Synar, for example.

[2] Q: Were those all being done the same day as yours?

[4] A: I don't recall.

[5] Q: "Pre-interview for tomorrow shoot."

[7] A: I could only conjecture, sir. I do not know.

[9] Q: But you were quite explicit in your recollection that neither at that dinner nor at any other meeting up front of the taped interview was there any discussion of what they were going to talk to you about in the taped interview?

[15] A: Walt Bogdanich, sir, and Keith Summa, I might add, are very professional — this is significant; very professional about the way they approach this.

[19] There is no way that they would have done anything to have skewed the interview they did with me.

[22] They explicitly said that they would not discuss that ahead of time.

[24] If we spoke about these issues generally, certainly those issues would have

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[1] come up in the interview.

[2] But in no other fashion would we have discussed this, no.

[4] Q: Did they tell you that they thought there was something wrong with talking to somebody about the subject matter of the interview before the interview?

[8] A: All I recall is they said it would not be appropriate, for example, to tell me the questions that they would ask me so that I could prepare ahead of time. They would not do so.

[13] Q: Did they tell you that they thought it was inappropriate to break off an interview in the middle and discuss with the interviewee what questions they would ask when the tape was started again?

[18] A: I have no recollection of that, sir.

[20] Q: We have marked what purports to be a taped interview with you as Exhibit 105.

[22] MS. ZIEVE: What page are you referring to?

[24] BY MR. WACHTELL:

[25] Q: Let me direct your attention

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[1] first to page 8-11.

[2] Who was putting the questions to you?

[4] A: I believe I was asked questions by Walt Bogdanich most of the time.

[6] Keith Summa, I believe, may have asked a couple of questions, if I remember correctly.

[9] Q: Do you believe the questions on this page were Mr. Bogdanich's?

[11] A: Chances are they were, sir, but I'm not certain.

[13] Q: The question is:

[14] "FDA chooses not to use authority that it may have or is it legally barred from acting?"

[17] Answer: "The FDA could act if it chose to act. That's the simple answer. They are not prohibited by any law from dealing with tobacco products."

[21] Did you give that answer to that question?

[23] A: It looks like an answer I would have given, sir.

[25] Q: Is there some particular reason

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[1] why you never referred to Mr. Bogdanich in any of these answers as "sir"?

[3] A: I don't understand the question, sir.

[5] I don't recall that at all.

[6] MS. ZIEVE: Can you explain the relevance?

[8] MR. WACHTELL: Sure. We probably have about 8,000 words on this transcript where the witness has referred to me in each of his answers as "sir," sometimes more than once.

[13] I'm just curious why he never referred to Mr. Bogdanich and gave him the dignity of referring to Mr. Bogdanich as "sir."

[16] MS. ZIEVE: Cliff, don't answer.

[17] MR. WACHTELL: The cost of the "sirs" on this transcript probably would feed Afghanistan.

[20] MS. ZIEVE: Do you have a relevant question that would likely lead to admissible evidence?

[23] MR. WACHTELL: Yes, Counsel, I have a lot more relevant questions that will both be admissible and will lead to admissible

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[1] evidence.

[2] BY MR. WACHTELL:

[3] Q: Now, Mr. Bogdanich, or the one you think was Mr. Bogdanich, then asks you, quote:

[6] "What sorts of developments could lead the FDA to change its mind and start regulating?"

[9] And this transcript indicates that you say:

[11] "I would think that when the FDA becomes aware of the fact that nicotine is manipulated as an additive, that the tobacco companies are using it as a drug to induce drug effects in smokers, that the FDA will have a really good" — "a really good hook to deal with this problem."

[18] Did you make that statement?

[19] A: I assume I did, sir.

[20] Q: Did you believe it to be true?

[21] A: Yes, sir. I believe it to be true today as well, sir.

[23] Q: Turn to the next page. Mr. Bogdanich, or the one who we think is Mr. Bogdanich:

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[1] Quote: "Do you think the public — surely the public knows that, you know, in modern day technology that — you know, any substance could be removed. I mean, do you think they — they probably know that? Or do they? Or is this a big secret? Tell me."

[7] Cliff Douglas: "It's a big secret."

[9] Narrator: "That's a big secret?"

[11] Cliff Douglas: "The public doesn't know that the industry manipulates nicotine, takes it out, puts it back in, uses it as if it were sugar being put in candy. They don't have a clue."

[16] I'm going to stop there for a moment.

[18] Am I correct that you were, there, describing the process whereby reconstituted tobacco is manufactured?

[21] A: Not solely, sir.

[22] Q: "Takes it out, puts it back in." Is that a description of the reconstituted tobacco process?

[25] A: It is, sir.

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[1] It could go further as well, sir.

[3] Q: Is there any other process connected with the manufacture of cigarettes which you understand has anything to do with taking nicotine out and putting it back in?

[7] A: Tobacco extract has been used, including substantial quantities of nicotine, in the absence of reconstituted tobacco, sir.

[10] Q: You think the description "takes it out, puts it back in" is referring to tobacco extract?

[13] Is that what you meant to convey?

[15] A: It does refer, I believe, to the extraction of nicotine and the use of nicotine separately as an additive, yes, sir. Absolutely.

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[19] Q: That's what you meant to convey when you said "takes it out, puts it back in"?

[21] Is that your testimony?

[22] MR. WITTEN: In addition to what he said earlier?

[24] MR. WACHTELL: Yes.

[25] BY MR. WACHTELL:

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[1] Q: Is that your testimony?

[2] A: Yes, sir.

[3] Q: Let me turn to page 8-18. The narrator, presumably Mr. Bogdanich:

[6] "Do you think the public understands? Do you think Congress, policymakers realize, including — including the FDA in that, realize that a large portion of the cigarette — a significant portion of the cigarette is really made of sort of a waste filler?"

[13] I'm going to stop right there. Did you understand when that question was being put to you that Mr. Bogdanich's use of the term "waste filler" referred to the raw materials that went into reconstituted tobacco?

[19] MS. ZIEVE: Object to the form.

[20] THE WITNESS: I'm not certain what I understood at that very moment, sir, but I will tell you, based on my knowledge now, that yes, that's what I would assume it to mean.

[25] BY MR. WACHTELL:

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[1] Q: To your best belief, that's what you understood it to mean and what you were answering at that time; is that correct?

[4] A: I assume that that is what I was basing my answer on.

[6] Q: Let me continue with the question:

[8] "That in its natural state doesn't contain but merely a trace of nicotine."

[11] Let me stop there. Did you understand that to be true, that in its natural state that the raw materials used for reconstituted tobacco "doesn't contain but merely a trace of nicotine"?

[17] MS. ZIEVE: I'm not sure this quote is clear what the "it" "in its natural state" refers to.

[20] MR. WACHTELL: Counsel, that is improper.

[22] MS. ZIEVE: No, it could refer —

[24] MR. WACHTELL: Counsel, I am going to interrupt you.

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[1] If you will persist in trying to tell the witness how he should testify, I'm going to seek sanctions.

[4] MS. ZIEVE: I object to your question as misleading.

[6] MR. WACHTELL: No, it is not my question that is misleading; it is you who is seeking to mislead and coach.

[9] BY MR. WACHTELL:

[10] Q: Would you answer my question, please?

[12] A: I can only conjecture what was meant there, sir.

[14] I gave my answer in response to his question.

[16] Q: But will you please give me an answer in response to my question?

[18] A: What is your question, sir?

[19] Q: Now that your counsel has thrown all of us, I guess we will have to go back and find out.

[22] The question was: Did you understand that to be true, that in its natural state that the raw materials used for reconstituted tobacco

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[1] "doesn't contain but merely a trace of nicotine?"

[3] A: I don't know. That's a highly subjective word. I'm not certain, sir.

[5] That's my answer, sir.

[6] THE WITNESS: Could I take a break, please?

[8] VIDEO OPERATOR: We have approximately 31 minutes left on this tape.

[10] MR. WACHTELL: Why don't we take a very brief break and then we can resume, and then we will finish the tape and quit for the day.

[14] VIDEO OPERATOR: Going off the videotape record. The time now is approximately 4:12.

(Recess.)

[20] VIDEO OPERATOR: Going back on the videotape record. The time now is approximately 4:22.

[24] BY MR. WACHTELL:

[25] Q: Mr. Douglas, is it correct that

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[1] as you sit here now, you are aware that the raw materials that go into reconstituted tobacco contain substantial amounts of nicotine?

[4] A: The raw materials that go into the tobacco, sir?

[6] Or did I misunderstand your question?

[8] Q: Perhaps I did not word it the way I wanted to say it. Let me try again.

[10] No, my question is the question I wanted to ask.

[12] As you sit here now, is it correct that you are aware that the raw materials that go into the reconstituted tobacco contain substantial amounts of nicotine?

[17] A: The reason I hesitate, sir, is "substantial" needs to be defined. But yes, it is my understanding that nicotine is added to reconstituted tobacco, sir.

[21] Q: No, I'm sorry; that is not a responsive answer. I move to strike it.

[23] And we have already exhausted whatever knowledge you have or particularly do not have on the subject of any nicotine ever

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[1] being added to reconstituted tobacco.

[2] Now, let me try again. You understand that the raw materials for reconstituted tobacco are leaf stems, leaf scraps, and the like; is that right?

[7] A: Garbage.

[8] Q: Garbage. You call it "garbage"?

[10] A: They scrape it off the floor, sir, yes.

[12] Q: Do you know that they scrape anything off the floor for the reconstituted tobacco process?

[15] A: Yes, that's what I've been told, sir.

[17] Q: What is it you understand they scrape off the floor?

[19] A: The dust, the stems, pieces, whatever is down there, sir, including dirt, I assume.

[22] Q: You assume. But you don't know; is that correct?

[24] A: No, I don't know for certain. I've never seen it done, sir.

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[1] Q: You assume a lot of things that you don't really know anything about; is that correct?

[4] MS. ZIEVE: Objection. Argumentative. You don't have to answer that.

(Instruction Not to Answer.)

[9] BY MR. WACHTELL:

[10] Q: Do you understand that the tobacco stems and leaf portions and other tobacco materials that are used in the reconstituted tobacco process contain substantial amounts of nicotine?

[15] A: I don't know, sir. It depends how you define "substantial."

[17] Q: Well, on page 36 of Exhibit 118, this Prosecution Memo, it says — and referring back to the ABC News Day One program, that:

[20] "The reconstituted tobacco coming out of the reconstituted tobacco plant was expected to have 25 percent of the nicotine that would be found in regular tobacco."

[24] Is that correct?

[25] A: Yes, sir. According to

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[1] Dr. Prokopczyk, yes, sir.

[2] Q: So you know that now, according to Dr. Prokopczyk; is that correct?

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[4] A: Yes, sir.

[5] Q: And you knew that back before the program, that that was what Dr. Prokopczyk was saying; is that correct?

[8] A: Not in this detail, no, sir.

[9] Q: Did you know it when you were being interviewed by Mr. Bogdanich on this tape?

[12] A: I don't recall, sir. I do recall, of course, speaking with knowledge of the article written by LTR's Silberstein, sir.

[15] Q: Would you please answer my question?

[17] MS. ZIEVE: I think he answered. You can look at the record.

[19] MR. WACHTELL: I move to strike everything after he says, "I don't recall, sir."

[22] BY MR. WACHTELL:

[23] Q: You understand that the leaf tobacco, or what is referred to on page 36 of this Prosecution Memo as regular tobacco,

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[1] contains substantial quantities of nicotine; is that correct?

[3] A: Yes, sir. And it varies among the different tobaccos, of course.

[5] Q: And you understand that 25 percent of that amount is still a very significant amount of nicotine; is that correct?

[9] A: I would believe it to be significant, yes, sir, based on my layperson's knowledge.

[12] Q: You would not consider it a "trace amount," would you?

[14] A: 25 percent? Probably not, sir.

[15] Q: Did you know back on January 27 of 1993 that the amount of nicotine in reconstituted tobacco was far more than any trace amount?

[19] A: Well, no, sir; it's not necessarily true, sir.

[21] As it says here, sir, it says that it ordinarily contains 25 percent or less. That leaves much room, depending on the reconstituted tobacco sheet you are referring to.

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[1] For all I know, it could be zero or close to, sir. I don't know.

[3] Q: You had no understanding on it at the time; is that your testimony?

[5] MR. VLADECK: It is not.

[6] MR. WACHTELL: Your counsel are all shaking their heads and saying you should deny that.

[9] MR. VLADECK: I am saying that that is not a fair indication of his testimony.

[11] MR. WACHTELL: I will try again.

[12] BY MR. WACHTELL:

[13] Q: Did you have an understanding at the time, January 27th of 1994, as to whether the amount of nicotine in reconstituted tobacco was merely a trace amount or was significant?

[17] A: I can't answer the question, sir.

[19] The answer that I can give to you is that it depended on the reconstituted tobacco to which one was referring.

[22] You couldn't generalize in that sense, in my view.

[24] Q: So you are saying that the amount of nicotine to be found in reconstituted

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[1] tobacco could vary widely; is that correct?

[2] A: That's my understanding, sir.

[3] Q: So that for Dr. Prokopczyk to compare what he pulled out of a cigarette with some ostensible norm would be a total fallacy; is that your testimony —

[7] A: No, that's not my testimony.

[8] Q: Could I finish my question?

[9] A: I didn't call it "ostensible," sir; you did.

[11] Q: So that for Dr. Prokopczyk to compare what he pulled out of a cigarette with some ostensible norm would be a total fallacy because the norm could vary widely; is that correct?

[16] A: There were so many characterizations, I can't answer your question, sir.

[19] Q: Well, why don't you try.

[20] A: What I will tell you is that ordinarily says to me that much of the time reconstituted tobacco is a certain way; it ordinarily is that way.

[24] It certainly leaves ~~over~~ wide room for great varieties of types of

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[1] reconstituted tobacco with different amounts of different substances, which are wholly in control of the tobacco companies, including Philip Morris, sir.

[5] Q: Have you ever heard anybody other than Mr. Bogdanich on this tape refer to the amount of nicotine ordinarily found in reconstituted tobacco as merely being a trace amount?

[10] A: I don't recall any.

[11] MR. WITTEN: I'm going to object to the form of the question.

[13] I think at this point the discussion has been unhinged from the actual words that Mr. Bogdanich used.

[16] MR. WACHTELL: Your opinion is noted. Your suggestion to the witness is noted.

[19] MR. WITTEN: No, it's really a suggestion to you.

[21] MR. WACHTELL: Roger, I will very happily do without any suggestions from you, so if you are making it to me, I would please ask you to restrain yourself.

[25] THE WITNESS: Well, I will say

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[1] that I don't need any suggestions and I'm speaking for myself, sir, under oath.

[3] Now, what was your question, sir?

[5] BY MR. WACHTELL:

[6] Q: Have you ever heard anybody other than Mr. Bogdanich refer to the content of nicotine found in reconstituted tobacco as merely being a trace of nicotine?

[10] MR. WITTEN: Object to the form of the question.

[12] I ask you to direct me to where he said that.

[14] BY MR. WACHTELL:

[15] Q: Would you answer my question, please?

[17] THE WITNESS: How do we handle this?

[19] BY MR. WACHTELL:

[20] Q: You handle it by answering my question, please.

[22] A: I don't recall hearing that from others, sir, no.

[24] It doesn't mean it didn't happen. I don't recall it.

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[1] Q: Anything in the world can happen, as this deposition proves.

[3] A: Yes, it can.

[4] Q: Now, was your understanding of the amount of nicotine to be found in reconstituted tobacco different on January 27, 1994 than when you worked on this Meehan report at page 36?

[9] A: It was less informed at that point, sir, and more informed later.

[11] If that means "different," sir, yes, it was.

[13] Q: Let me direct your attention to where you say:

[15] "People in the health community, Congress, the Executive Branch have known for years that the tobacco companies have developed processes that employ less tobacco in the final product."

[20] What processes were you referring to?

[22] A: The processes of using reconstituted tobacco, sir, and also puffing tobacco.

[25] Q: So the fact that the tobacco

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[1] companies used reconstituted tobacco and puffed tobacco was something that was well known for years; is that correct?

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A: Relatively well known, sir. I believe so.
Q: It was not a secret; correct?
A: Among those who are informed, sir.
Q: It was not a secret; is that correct?
A: Pardon me?
Q: It was not a secret; is that correct?
A: Yes, sir.
Q: Yes, sir, it was not a secret; is that correct?
A: Yes, sir, it was not a secret, to my knowledge.
Q: "But none of us, none of these people had a clue that what they were doing was replacing the tobacco that used to be in there with a bunch of junk—dust, stems, dirt—and then spraying the drug-additive nicotine on that junk."
I'm going to stop there.

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What is it that you are saying that people did not have a clue about? Replacing tobacco with what you referred to as junk, or spraying the drug-additive nicotine on that junk?
A: Could you finish reading that sentence, sir, please?
Q: No. I wish to direct you to that portion of the sentence.
A: "And putting that into the tobacco roll that people eventually buy and smoke."
Q: Would you answer my question, please?
A: What was the question, sir?
Q: You've managed to derail it.
A: You could repeat it. Thank you.
Q: What is it that you are saying that people did not have a clue about?
Was it that what the tobacco companies were doing was replacing the tobacco that used to be in there with what you call a bunch of junk, or was it that they were spraying the drug-additive nicotine on what you referred to as junk?

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MS. ZIEVE: Object to the form.
THE WITNESS: I believe it is two things, and the average smoker clearly was not aware of either of those things, sir.
BY MR. WACHTELL:
Q: Now, when you say, quote:
"Then spraying the drug-additive nicotine on that junk," did you have any basis for making that statement, other than you have testified to here today, that you, as to what you knew, assumed — thought might be the case, or whatever, at that point in time?
A: It clearly was true, sir, and is.
Q: Well, Mr. Douglas, if you don't want to be contentious, then don't make provocative false statements, because if you make it enough times out of the protection of this deposition room, we might have to take another libel action.
MS. ZIEVE: Let's not have threats or insults.
You can ask him a question, otherwise you are not to address this witness.
MR. WACHTELL: Counsel, this

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witness is acting in a provocative way. He was not responding to my question.
I am merely making it very clear on the record what my position is, so don't get hysterical about it.
MR. VLADECK: No one is getting hysterical about it. Don't threaten our witness.
MR. WACHTELL: How about one counsel at a time?
Counsel, I've put up with both of you trying to double-team me for two days now. We've got about ten minutes more to go. Why don't you decide who's representing the witness?
I've been very, very patient and very lenient with your double-teaming and totally improper conduct from across the table.
You can stop smirking. Maybe we should point the camera at you.
MS. ZIEVE: Your threats don't change the truth.
Let me just repeat — do not interrupt me.
If you threaten him or insult

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him, we are going to leave and we will not be back.
It is your choice. Ask him questions and he will answer. Threaten him and we will be gone.
BY MR. WACHTELL:
Q: Mr. Douglas, my question of you is whether at page 8-19 of this transcript, you said, "then spraying the drug-additive nicotine on that junk" — let me first ask you, did you make that statement?
A: Yes, sir.
Q: Was your basis for that statement anything other than the testimony that you have given me in answer to questions in this deposition as to the totality of your knowledge as of that point in time on the subject of whether or not tobacco companies added any nicotine in the course of the reconstituted tobacco process?
MR. WITTEN: Object to the form of the question.
THE WITNESS: I have testified to several examples, I believe, of information indicating that nicotine is added to

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reconstituted tobacco.
I'm trying to recall and I will recall, without dead certainty, sir, that in the list of additives provided by the tobacco industry, or at least by the cigarette makers en masse to the federal government, that among the list — or in the list, has been listed nicotine and nicotine sulphate, so thereby exists an admission, I believe, by the tobacco companies that they have used nicotine as an additive, sir.
BY MR. WACHTELL:
Q: When did you find that out?
A: I don't recall, sir.
Q: Was it before February 28th of 1994 that you learned of anything that was on the list?
A: I don't recall, sir.
Q: Well, give me your best recollection.
Did somebody illegally give you information from the list before it was publicly disclosed?
Don't laugh. I'm asking you a question.

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A: I don't break the law. No, sir.
Q: So you are testifying that you did not have this information prior to February 28th of 1994; is that correct?
For whatever the significance of the information may be.
MS. ZIEVE: Objection as to form.
THE WITNESS: I assume that I learned it upon the reports from the media, sir.
BY MR. WACHTELL:
Q: That was after the tobacco companies publicly released the list, and that was subsequent to February 28th of 1994; is that correct?
A: No, sir.
Q: Let me be clear: Whenever it was that the tobacco companies released the list is when you learned it; is that correct?
A: No, sir.
Q: Did you learn it prior to the time that the tobacco companies released the list?

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A: I believe so, sir, yes. I believe I learned it when it was aired on broadcast media, sir.
Q: When was that and by whom?
A: I believe that it was reported on by Day One, among others.

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I believe NPR reported on additives as well.

I don't remember the specifics, but it was before the industry so-called voluntarily decided to do so on its own.

Q: The statement that the list contains additives "nicotine" and "nicotine sulphate," is it your testimony that you learned that at any time before the industry voluntarily made the list public?

MR. WITTEN: Object to the form of the question.

MS. ZIEVE: Object to the form of the question.

THE WITNESS: As I said, and I will say again: I believe I learned it when it was aired on ABC, sir.

BY MR. WACHTELL:

Q: Was it aired on ABC prior to

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February 28th of 1994?

A: I don't believe so, sir.

Q: So you did not know that information as of February 28th of 1994; is that correct?

A: Yes. And that wasn't your question earlier, sir.

Q: Yes, it was, as the record will show.

A: It was earlier.

Q: Mr. Douglas, I will not debate with you. The record will be very, very clear what my question was.

A: You asked about the release of the additives list by the tobacco companies, and I responded that it was before then, sir.

Q: Okay, Counsel; I am going to take the time to go back, because I don't like this kind of nonsense, and we will find the answer, and I will find it for you.

A: I will tell you the truth, sir, if you allow me to.

Q: Counsel, there is no question pending now.

At page 289 of the screen,

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referring to the witness's testimony about information on the list and his previous lines of answer:

Question: "When did you find that out?"

Answer: "I don't recall, sir."

Question: "Was it before February 28th of 1994 that you learned of anything that was on the list?"

Answer: "I don't recall, sir."

MR. VLADECK: What does that reference, again?

MR. WACHTELL: It references his prior answer, in which he testified to nicotine and nicotine sulphate supposedly being on the list.

MS. ZIEVE: What page is it? What page are we reading from?

MR. WACHTELL: 289, for the third time.

MS. ZIEVE: We are only up to 149 on ours.

MR. WACHTELL: You are way behind.

BY MR. WACHTELL:

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Q: Let me try again: Is there anything else that you knew, as of January 27 of 1994, that was the basis for this statement that you made at the top of page 8-19 of this transcript about, quote, "Then spraying the drug-additive nicotine on that junk," that you have not testified to at this deposition?

A: I don't recall other things, sir, no.

Q: Let me direct your attention to page 9-3 of this transcript.

It quotes you as saying:

"The FDA historically has had a tough time politically. It's had a tough time because it's facing an industry whose revenues are $50 billion a year. It's got a great deal of political power.

"What we're looking at now, though, is that we might have the story here that will give the FDA what it needs, because now that the FDA can act on the fact that the tobacco companies are using nicotine as a drug and as an additive, there's no question about it; they should be able to move."

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Did you make that statement?

A: Yes, I did.

Q: Did you believe that statement to be true?

A: Yes, I did.

MR. WACHTELL: Let's go off the record.

VIDEO OPERATOR: Going off the videotape record. The time now is 4:46.

(Off the record.)

VIDEO OPERATOR: Going back on the videotape record. The time now is 4:49.

Please continue.

MR. WACHTELL: I don't want to have an anticlimax, but I would be going on at this point to other subject matters with the witness, and given the fact that we are at approximately — well, the technician's clock says 4:49. Mine says 4:57.

But in any event —

MR. WITTEN: I am going to say I am in total agreement with Mr. Wachtell as to

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the time of day.

MR. WACHTELL: So I think it makes more sense, instead of trying to switch subjects at this point, that we suspend.

I don't know that we can fix another date now.

I think it would make more sense for us all to look at our calendars and see what date makes sense for resumption.

MR. VLADECK: Can you give us a sense of how many more days you are going to need?

MR. WACHTELL: I think that is probably a function of what happens on these claims of privilege.

MR. VLADECK: Okay.

MR. WACHTELL: I would hope that the next day could, frankly, conclude it.

But obviously, if we still have open issues of privilege, that will not be the case.

MS. ZIEVE: Other than any issues that aren't resolved until after some motion practice, when we do reconvene, we are going in consecutive days until we finish.

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I indicated to Mr. Murphy before I wanted consecutive days, and obviously it's not possible here, but when we reconvene, make sure that everybody can be here until it's done.

MR. WACHTELL: That's perfectly fine with me.

As I indicated, I'm hopeful, absent the privilege issues, that it would be one day. So it's probably an academic question.

VIDEO OPERATOR: Going off the video record. The time is now 4:52. This is the end of tape number 6.

(Deposition adjourned at 4:59 p.m.)

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CERTIFICATE

I, JANE ROSE, Certified Shorthand Reporter and Notary Public, hereby certify that the foregoing is a true and accurate transcript of the deposition of said witness who was first duly sworn by me on the date and place hereinbefore set forth.

I FURTHER CERTIFY that I am neither attorney nor counsel for, nor related to or employed by, any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.

Dated this 28th day of December, 1994.

Jane C. Rose
Certified Shorthand Reporter
308 East Fifty-First Street
New York, New York 10022
1-800-825-3341

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ACKNOWLEDGMENT OF DEPONENT

I, CLIFFORD E. DOUGLAS,

do hereby certify that I have read the foregoing pages and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

(DATE) CLIFFORD E. DOUGLAS

Signed and subscribed to before me

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this ____ day of _____, 1994.
Notary Public

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